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WISCONSIN REPORTS
138

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

FEBRUARY 16—MARCH 30, 1909

FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
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1909

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

JOHN B. WINSLOW
Ex officio CHIEF JUSTICE
ROUJET D. MARSHALL
JOSHUA ERIC DODGE
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES

Attorney General - - FRANK L. GILBERT

Clerk - - - CLARENCE KELLOGG

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MEMORANDUM.

Mr. Chief Justice WINSLOW took no part in the decision of the cases reported in this volume except the cases of *Jeffery v. Chicago & M. E. R. Co.* (page 1) and *State ex rel. Bashford v. Frear* (page 536) and those cases which are reported on pages 179 to 367 inclusive.

ERRATA.

VOL. 137.

Page 147. After line 4 insert: KERWIN, J., took no part.
" 147, line 20. For contemplated, read completed.
" 694, last line. Same correction.

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TABLE

OF

CASES REPORTED.

Adelman, Will of: Flaherty v. Adelman..... 120

Wills: Trusts: Devise of rents and profits: Future estates: Perpetuities.

Allen v. Frawley..... 295

Action: Survival: Revival after death of party: Equity: Discretion: Necessity: Limitation of actions: Laches.

Bashford, State ex rel., v. Frear..... 536

Bates v. Winters..... 673

Deeds: Delivery.

Beranak, Severa v..... 144

Board of Trustees, Policemen's Pension Fund, State ex rel. McManus v..... 133

Board of Trustees, Wis. Veterans' Home, Smith v..... 628

Boring v. Ott..... 260

Judgment obtained by perjury: Restraining enforcement: Degree of proof required.

Bovina, Town of, Curtiss v..... 660

Bratz v. Stark..... 599

Negligence: Fires: Evidence: Special verdict: Omissions: Waiver.

Brooks, State v..... 560

Buckstaff-Edwards Co., Rankel v..... 442

Cayouette, Oconto Brewing Co. v..... 664

Chandos, Appeal of: Remington Drainage District..... 621

Chase v. Woodruff..... 641

Appeal: Former decision: Law of the case: Witnesses: Competency: Transactions with persons since deceased: Striking out testimony: Estoppel: Instructions to jury: Harmless errors.

Digitized by Google

Chicago Brass Co., Yezick v. 342
Chicago Fire Brick Co., Raulf v. 126
Chicago & Milwaukee Electric R. Co., Jeffery v. 1
Chicago, Milwaukee & St. Paul R. Co., Kiley v. 215
Chicago, Milwaukee & St. Paul R. Co., Sarles v. 498
Chicago & Northwestern R. Co., Meo v. 340
Collins, Pauly Jail Building & Manufacturing Co. v. 494
Copper River Land Co., Western Lime & C. Co. v. 404
Cotzhausen v. Dick 127

Drains: Special assessment: Restraining collection: Equity: Laches.

Curtiss v. Town of Bovina 660

Highways: Bridge built by private individuals: Adoption by town: Injuries from defects.

Czerwinski, Piotrowski v. 396

Day's Appeal: Kissinger v. Zieger 368
Dexter v. Witte 74

(1) Pleading: Amendment. (2, 3) Wills: When deed held testamentary: Delivery.

Dick, Cotzhausen v. 127
Donahue, Goetzinger v. 103
Duffy v. Radke 38

Witnesses: Impeachment: Motion for new trial: Questions raised: Excessive damages.

Ellinger v. Equitable Life Assurance Society 390

Discovery: Examination of adverse party before issue joined: Discretion: Unnecessary examination: Life insurance: Apportionment of surplus, etc., to semi-tontine policy: Pleading.

Ellis v. State 513

Criminal law: Receiving deposits in insolvent bank: Statute construed: Deposit of check as money: Indictment: Officer of bank receiving deposit: What constitutes a deposit: Deposit by debtor of bank: Insolvency: Evidence: Value of assets: Relevancy: Reputation as to financial standing: Presumption as to continuance of condition: How far retroactive: "Unsafe or insolvent."

Digitized by Google

Elmergreen v. Weimer..... 112

Corporations: Action, when may be brought by stockholder: Necessary parties: Pleading: Dissolution of corporation: Continuance for bringing of actions, etc.: Statutes of other states: Presumptions.

Equitable Life Assurance Society, Ellinger v..... 390
Equitable Life Assurance Society, Seidel v..... 66

FitzGerald, Marling v..... 93
Flaherty v. Adelman..... 120
Ford v. Freeman..... 503

Deceit: Special verdict: Sufficiency: Pleading: Allegation of damage.

Fox v. Postal Telegraph-Cable Co..... 648

Contracts: Validity: Public policy: Enforcement: Comity: Telegraphs: Stipulation against responsibility for negligence: Defense.

Frame v. Plumb..... 179

(1) Witnesses: Competency: Transactions with persons since deceased: Officers of corporations. (2-4) Constitutional law: Vested rights: Remedies: Change in rules of evidence. (5) Appeal: Affirmance: Majority not concurring as to error. (21) Rehearing: Inaccuracies. (6-20) Trusts: Expenses of litigation, from what funds payable: Guardians *ad litem:* Compensation: Necessary expenditures: Estates of decedents. (22) Corporations: Officers: Effect of resignation.

Frawley, Allen v..... 295
Frear, State ex rel. Bashford v..... 536
Frear, State ex rel. Rosenhein v..... 173
Freeman, Ford v..... 503

Gay v. Milwaukee Electric Railway & Light Co..... 348

Street railways; Injury to passenger: Special verdict: Sufficiency: Inference of negligence from accident: Excessive damages.

Goetsch v. International Harvester Co..... 385

Master and servant: Personal injury: Instruction as to operation of machine: Contributory negligence: Direction of verdict.

Digitized by Google

Goetzinger v. Donahue..... 103

Corporations: Assignment of stock as collateral security: Right to vote: Transfer on books: When to be surrendered: Contract construed: Protection of pledgee's security against impairment: Right to be officer of corporation.

Green Bay & Western Railroad, Leasum v..... 593

Grimm v. Milwaukee Electric Railway & Light Co..... 44

Street railways: Collision with vehicle: Contributory negligence: Court and jury: Duty of person about to cross tracks.

Haderer, Raschke v..... 129

Heckendorn v. Romadka..... 416

Discovery: Examination to enable plaintiff to plead: Sufficiency of affidavit: Cause of action: Corporations: Fraud inducing subscription to stock: Acts of officers: Liability, joint and several: Parties: Election of remedies: Trusts and trustees

Herdeman, Swanke v..... 654

Hicks Printing Co. v. Wisconsin Central R. Co..... 584

Contracts: Construction: Written and printed provisions: Practical construction: Illegality: Railroads: Advertising to be paid for in transportation: Accord and satisfaction.

Hintz v. Wald..... 41

Life insurance: Change of beneficiary: Fraud: Undue influence: Evidence: Trial by jury or by court: Cancellation of instruments.

International Harvester Co., Goetsch v..... 385

Isaacson v. Wisconsin Telephone Co..... 63

Master and servant: Liability for injury from defective appliance.

Jacobsen v. Whitely..... 434

Deceit: Reliance on statements: Knowledge of falsity: Evidence: Nonsuit: Sale of corporate stock: Election between remedies: Rescission: Ratification: Witnesses: Redirect examination.

Jeffery v. Chicago & Milwaukee Electric R. Co..... 1

Railroads: Condemnation of land: Vesting of title: Election to take lesser estate: Mitigation of damages: Tender back of easements, etc.: Crossings: Offer of option on other lands: Evidence of value: Special verdict: Duplication of damages: Existing easement as affecting damages: Instructions to jury.

Jones, Marling v..... 82

Digitized by Google

Kiley v. Chicago, Milwaukee & St. Paul R. Co. 215

Constitutional law: Equal protection of the laws: Due process of law: Corporations: "Persons:" Classification for legislative purposes: Railroad companies: Liability for injuries to employees: Questions for jury: Depriving courts of judicial power: Statutes: Partial invalidity: Police power: Contributory negligence: Comparative negligence: Liberty of contract: Injuries in other states.

Kimberly-Clark Co., Winnebago Paper Mills v. 425

Kissinger v. Zieger 368

(1, 2) Judgment on warrant of attorney: Setting aside: Grounds: Defense to note: Intoxication. (3–6) Execution: Issuance to another county: Sale, when consummated: Sheriff's deed, when to be issued: Setting aside execution sale: Grounds: Reference to determine facts: Waiver.

Koch, State ex rel. Leiser v. 27

Land, Wilburn v. 36

Leasum v. Green Bay & Western Railroad 593

Railroads: Injury to passenger riding in car with live stock.

Leiser, Estate of: Pereles v. Leiser 401

Executors and administrators: Claims not filed within time limited: Allowance: Mortgages: Foreclosure: Deficiency judgment against executor.

Leiser, State ex rel., v. Koch 27

Marling v. FitzGerald 93

Bills and notes: Consideration: Agreement to advance money: Transfer without indorsement: Defenses: Estoppel.

Marling v. Jones 82

Bills and notes: Accommodation paper: Consideration: Transfer after maturity: Rights of holder: Mortgages: Assignment: Failure to record: Payments: Rights of subsequent purchaser in good faith.

Maxwell v. Town of Wellington 607

Highways: Insufficiency: Personal injury: Location of defect: Amendment of complaint: Special verdict: Instructions to jury: Ground of action: Negligence: Remarks of court: Immaterial errors.

Digitized by Google

Mayhew, Moehlenpah v. 561
McKinney, Rosenberg v. 381
McManus, State ex rel., v. Trustees of Policemen's Pension Fund. 133
McNaughton, Will of: Frame v. Plumb 179
Meggett v. Northwestern Mutual Life Ins. Co. 636
Life insurance: Who may assign policy: Rights of assignee: Exclusion of beneficiaries.
Meo v. Chicago & Northwestern R. Co. 340
Railroads: Injury to employee: Negligence of co-employee: "Risk peculiar to the operation of railroads."
Milbrath v. State 354
Criminal law: Acts done by or through corporation: Embezzlement: Conversion of money: Demand when unnecessary: Evidence: Instructions to jury.
Milwaukee Electric Railway & Light Co., Gay v. 348
Milwaukee Electric Railway & Light Co., Grimm v. 44
Milwaukee Gas Light Co., Uhlenberg v. 148
Moehlenpah v. Mayhew 561
(1–4) Judgment: Prior death of one defendant: Conclusiveness between defendants. (13, 14) *Res judicata.* (5) Presumptions: Statutes of other states. (6, 7, 13) Findings: Materiality: How far conclusive. (7–15) Rescission of contracts: Sale of remainder: Mutual mistake of fact: Pleading: Fraud or mistake: Supplemental pleadings: Appeal: Reversal.
Moore, Estate of: Moore v. Moore 602
Wills: Construction: Codicil: Cutting down gift in prior provision: Precatory words: Costs.

Neale v. State 484
Evidence: Weight: Highways by user: Limits: Obstruction: Dedication: Instructions to jury: Appeal: Material and immaterial errors.
Niezorawski, Sanitas Co. v. 377
Northwestern Mutual Life Ins. Co., Meggett v. 636

Oconto Brewing Co. v. Cayouette 664
(1) Appeal: Order granting new trial for error of law: Review. (2, 3) Contracts: Validity: Lack of mutuality: Executed contract.

Digitized by Google

Oshkosh Gas Light Co., Ryan v. 466
Ott, Boring v. 260

Palmer v. Schultz 455
Pleading: Amendment of answer: Discretion: Appeal: Harmless error: Evidence: Opinions: Qualification of witness: Special verdict: Form of questions: Evidentiary matters: Death caused by negligence: Intoxication: Instructions to jury: Defining "ordinary care."

Patterson, State ex rel. Pittsburgh Coal Co. v. 475
Pauly Jail Building & Manufacturing Co. v. Collins 494
Principal and surety: Subcontractor's bond: Release of surety.

Pereles v. Leiser 401
Piotrowski v. Czerwinski 396
Setoff: Equitable counterclaim against claim of nonresident insolvent.

Pittsburgh Coal Co., State ex rel., v. Patterson 475
Plumb, Frame v. 179
Policemen's Pens. F'd Trustees, State ex rel. McManus v. 133
Postal Telegraph-Cable Co., Fox v. 648

Radke, Duffy v. 38
Rankel v. Buckstaff-Edwards Co. 442
Master and servant: Injury to servant: Independent contractor: Negligence of fellow-servant: Care in selection: Who are fellow-servants: Assumption of risk: Duty to warn servant of dangers.

Raschke v. Haderer 129
Life insurance: Mutual benefit society: Change of beneficiary: Supposed loss of certificate: Mistake.

Raulf v. Chicago Fire Brick Co. 126
Process: Proving falsity of return of service.

Remington Drainage District: Appeal of Chandos 621
Drains: Validity of drainage laws: Statute construed: Provisions for new assessment of benefits: Pleading: Demurrer.

Ripley v. Sage Land & Improvement Co. 304
Account stated: Acquiescence: Conclusiveness.

Digitized by Google

Rolling, Town of, v. Wunderlich..... 667

(1) Appeal: Review: Assumption as to facts. (2–4) Towns: Purchase of half interest in hall: Land included: Petition construed: Town officers: Liability for money received: Authority to bring action.

Romadka, Heckendorn v...... 416

Rosenberg v. McKinney..... 381

Sales: Fraud: Election to affirm: Conversion of personalty: Evidence: Appeal: Direction of judgment below.

Rosenhein, State ex rel., v. Frear..... 173

Ryan v. Oshkosh Gas Light Co...... 466

Death caused by negligence: Defect in electric lighting wires: Sufficiency of special verdict: Instructions to jury: Evidence: Examination of hostile witness: Discretion: Damages.

Sage Land & Improvement Co., Ripley v...... 304

St. Anthony Mining and Milling Co. v. Shaffra..... 507

Mining rights under license or lease: Revocation: Statute construed: "Crevice or range:" "Discovery:" Presumptions: Notice to quit: Immaterial defects.

Sanitas Co. v. Niezorawski..... 377

Foreign corporations: Doing business in this state: Pleading: Findings of fact: Interstate commerce: Sales: Liability of agent's surety.

Sarles v. Chicago, Milwaukee & St. Paul R. Co...... 498

Railroads: Injury to traveler at highway crossing: Contributory negligence: Duty to look and listen: Unmanageable horses.

Sbragia, State v...... 579

Schmidt, State v...... 53

Schultz, Palmer v...... 455

Seidel v. Equitable Life Assurance Society..... 66

Contracts: Failure in strict performance: Waiver of forfeiture: Life insurance: Acceptance of premiums after default.

Severa v. Beranak..... 144

Marriage of divorced person within year: Invalidity: Common-law marriage: Mutual benefit insurance: Who may be beneficiaries.

Shaffra, St. Anthony Mining and Milling Co. v...... 507

Digitized by Google

Smith v. Board of Trustees, Wisconsin Veterans' Home.. 628

Corporations: Veterans' Home: Discharge of inmate for misconduct: Security for costs: Discretion.

Smith's Appeal: Meggett v. Northwestern Mut. L. Ins. Co. 636

Stark, Bratz v...... 599

State v. Brooks..... 560

Criminal law: Rape: Conviction of person aiding.

State, Ellis v......513

State, Milbrath v...... 354

State, Neale v...... 484

State v. Sbragia..... 579

Criminal law: Sale of cigarette paper: Coupon in sealed package of tobacco: Interstate commerce.

State v. Schmidt..... 53

Physicians and surgeons: Registration: Review of decision of board of medical examiners: Who are "reputable physicians."

State, Vogel v...... 315

State, Weisenbach v...... 152

State ex rel. Bashford v. Frear..... 536

Supreme court: Justices: Term of office: Appointment to fill vacancy: Change in compensation: Constitutional law: Practical construction.

State ex rel. Leiser v. Koch..... 27

Municipal ordinances: Judicial notice: Pleading: Conclusion of law: Demurrer: *Mandamus:* Building inspector: Compelling issuance of permit: Sufficiency of return.

State ex rel. McManus v. Trustees of Policemen's Pension Fund: Sullivan's Appeal..... 133

Policemen's pension fund: Statute construed: Disease is "injury:" *Certiorari:* What reviewable.

State ex rel. Pittsburgh Coal Co. v. Patterson..... 475

(1) *Certiorari:* Practice: Findings of fact. (2, 3) Sales: Delivery f. o. b. cars: When title passes.

State ex rel. Rosenhein v. Frear..... 173

Supreme court: Original jurisdiction: Taxpayer's action: Restraining illegal disbursement of state moneys: Constitutionality of statute, when not determined: Powers of state legislature: Investigations: Incurring of expenses: Creating "debt:" Public purpose: Judicial tribunal: Primary election law

Digitized by Google

Sullivan's Appeal..... 133
Swanke v. Herdeman..... 654

Sales: Fraud: Knowledge with which purchasers are chargeable: Unsoundness of horse: Questions for jury: Tender of rescission: Defects: Waiver: Nonnegotiable notes: Signature procured by fraud: Delivery: Appeal: Costs: Printed case violating rule.

Trustees of Policemen's Pension Fund, State ex rel. McManus v...... 133
Trustees of Wisconsin Veterans' Home, Smith v...... 628

Uhlenberg v. Milwaukee Gas Light Co...... 148

Actions: Limitations: Condition precedent: Notice of personal injury: Essentials: Municipal corporations: Defective streets: Primary liability of person not served with notice.

Vogel v. State..... 315

Rape: Evidence: Sufficiency: Review in appellate court: Corroboration: Jurors: Special venire prematurely issued: Harmless irregularity: Presence of accused, when necessary: Information: Conviction of persons aiding and abetting: Instructions to jury: Acts constituting one or several offenses: Election as to particular act: Waiver: *Res gestæ:* Impeachment of witnesses: Conviction of lesser offense: Fornication: Assault and battery: Arguments of counsel: Improper remarks: Immaterial error.

Wald, Hintz v...... 41
Weimer, Elmergreen v...... 112
Weisenbach v. State..... 152

Criminal law: Assault with intent to kill: Conspiracy: Trial of one conspirator: Opening statement: Evidence: Resistance to arrest: Previous threats: Submission of lesser degrees included in charge: Instructions to jury: Intent: Presumptions.

Wellington, Town of, Maxwell v...... 607
Western Lime & Cement Co. v. Copper River Land Co... 404

(1) Contracts: Construction by court: Findings of fact: Presumption on appeal. (2-7, 9) Vendor and purchaser: Exception or reservation? When title passes: Rights of vendor's assignee: Removal of timber excepted from grant: Limitation of time: Condition subsequent: Payment of taxes. (8) Parol evidence affecting writing.

Digitized by Google

Whitely, Jacobsen v. 434
Wilburn v. Land 36
Ejectment: Legal title or right of possession essential: Homestead: Conveyance without wife's signature.
Winnebago Paper Mills v. Kimberly-Clark Co. 425
Waters: Conveyance of water-power dam, canals, etc.: Title to lock: Easement or fee?
Winters, Bates v. 673
Wisconsin Central R. Co., Hicks Printing Co. v. 584
Wisconsin Telephone Co., Isaacson v. 63
Wisconsin Veterans' Home, Trustees of, Smith v. 628
Witte, Dexter v. 74
Woodruff, Chase v. 641
Wunderlich, Town of Rolling v. 667

Yezick v. Chicago Brass Co. 342
Master and servant: Injury: Dangerous working place: Evidence: Assumption of risk.

Zieger, Kissinger v. 368

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CITATIONS BY THE COURT.

CASES CITED.

Ableman v. Roth 12 W. 81 273, 284
Adams v. Secor 6 Kan. 542 - 289
Albrecht v. C. & N. W. R. Co. 108 W. 530 - - - - 452
Albright v. Albright 70 W. 528 676
Alfree v. Gates 82 Iowa 19 - 591
Allen v. U. S. 164 U. S. 492 - 171
Ames v. Snider 55 Ill. 498 - 289
Andresen v. Upham Mfg. Co. 120 W. 561 - - - - 34
Angell v. Rosenbury 12 Mich. 241 - - - - - 523
Angus v. Lee 40 Ill. App. 304 29
Appleton I. Co. v. British Am. Assur. Co. 46 W. 23 - - 591
Ashby v. White 2 Ld. Raym. 938 - - - - - 212
Atchison, T. & S. F. R. Co. v. Matthews 174 U. S. 96 - 225, 249
Atlanta G. Co. v. Hunt 100 Tenn. 89 - - - - - 98
Att'y Gen. v. North Am. L. Ins. Co. 91 N. Y. 57 - - 195
—— v. Railroad Cos. 35 W. 425 248
Aukland v. Arnold 131 W. 64 659
Austin v. Feland 8 Mo. 309 - 400
—— v. Saveland's Estate 77 W. 108 - - - - - 403

Babcock v. C. & N. W. R. Co. 107 W. 280 - - - - 9, 10
Bacon v. Bowdoin 22 Pick. 401 671
—— v. Harris 15 R. I. 599 - 89
Badger B. Mfg. Co. v. Daly 137 W. 601 - - - - 392, 396
Bailey v. Sundberg 145 U. S. 628 291
—— v. —— 154 U. S. 494 - 291
Baker v. State 54 W. 368 - 531
—— v. Whiting 1 Story 218 - 578
Balch v. Beach 119 W. 77 267, 269–271, 273, 278
Ballard v. Miss. C. O. Co. 81 Miss. 507 - - - - 251
Ballston Spa Bank v. Marine Bank 16 W. 120 - - - 461
Bank of Middlebury v. Rutland 33 Vt. 414 - - - 523
Barber v. Rukeyser 39 W. 590 271, 273, 277
Barker v. M. & L. W. R. Co. 59 W. 364 - - - - 22
Barndt v. Frederick 78 W. 1 - 437
Barnes v. Huntley 188 Mass. 274 - - - - - 576
Barnum v. Gilman 27 Minn. 466 - - - - - 540
Bartel v. Brown 104 W. 493 - 91
Bartlett v. Beardmore 77 W. 356 - - - - - 487
—— v. Collins 109 W. 477 117, 652
Battle v. Weems 44 Ala. 105 - 89
Beach v. Reynolds 64 Barb. 506 298
Beals v. Cone 27 Colo. 473 - 510
Beaser v. Barber A. P. Co. 120 W. 599 - - - - - 129
Becker v. Chester 115 W. 90 125, 192, 193
Beleal v. N. P. R. Co. 15 N. Dak. 318 - - - - 251
Bell v. Morrison 27 Miss. 68 190, 210, 211, 213
Bellas, Estate of, 176 Pa. St. 122 - - - - - 606
Belleville Sav. Bank v. Bornman 124 Ill. 200 - - - 96
Bendernagle v. Cocks 19 Wend. 207 - - - - - 577
Berryman v. Graham 21 N. J. Eq. 370 - - - - - 572
Besson v. Cox 35 N. J. Eq. 87 189
Bigelow v. West Wis. R. Co. 27 W. 478 - - - - 9
Bills v. Bills 80 Iowa 269 - 606
Bingham v. Milwaukee Co. 127 W. 344 - - - - - 237
Bishop v. Seeley 18 Conn. 389 433

Digitized by Google

Black v. Tarbell 89 W. 390 - 88
Blankavag v. Badger B. & L. Co. 136 W. 380 - - - 462
Bloomer v. Bloomer 128 W. 297 237
Bloss v. Hull 27 W. Va. 503 273, 293
Board of Ed. v. State 64 Kan. 6 670
Boardman v. L. S. & M. S. R. Co. 84 N. Y. 157 - - - 98
Bogart v. Stevens 69 N. J. Eq. 800 - - - - - 98, 99
Bogie v. Waupun 75 W. 1 - 663
Boldt v. State 72 W. 7 - - 332
Boltz v. Sullivan 101 W. 608 - 619
Bonnell v. Jacobs 36 W. 59 - 441
Bonnett v. Vallier 136 W. 194 259
Borden v. Daisy R. M. Co. 98 W. 407 - - - - - - 66
Bostwick v. Mut. L. Ins. Co. 116 W. 392 - - 309, 314, 437
Bowe v. Gage 127 W. 245 - 437
Boyd v. Mut. F. Asso. 116 W. 155 - - - - - 300, 302
Boyle v. Lybrand 113 W. 79 - 100
Bradford C. Co. v. Heflin 88 Miss. 314 - - - - - 251
Braunsdorf v. Fellner 76 W. 1 578
Breese v. U. S. Tel. Co. 48 N. Y. 132 - - - - - - 651
Breitung, Estate of, 78 W. 33 640
Bright v. Barnett & R. Co. 88 W. 299 - - - - - - 474
Briscoe v. York 53 Ill. 484 - 375
Brittingham & H. L. Co. v. Manson 108 W. 221 - - 415
Bromley v. Mitchell 155 Mass. 509 - - - - - - 80
Brown v. Phillips 71 W. 239 - 117
—— v. State 127 W. 193 320, 322
—— v. Turner 113 Mo. 27 - 671
Browning v. State 33 Miss. 47 190, 191, 208, 210, 211, 213
Buckley v. Eisendrath 58 Ill. App. 364 - - - - - 29
Budlong, Will of, 100 N. Y. 203 196
Buel v. State 104 W. 132 162, 165
Buffalo v. Holloway 7 N. Y. 493 - - - - - - 29
Building & L. Asso. v. Griffin 90 Tex. 480 - - - - - 652
Bunch v. Nicks 50 Ark. 367 - 80
Burgson v. Jacobson 124 W. 295 - - - - - - 412
Burke v. Dulaney 153 U. S. 228 96
Burlington University v. Barrett 22 Iowa 60 - - - 80
Burns v. Elba 32 W. 605 - 468
Bush v. Cushman 27 N. J. Eq. 131 - - - 98, 99, 101
Butler v. Townsend 126 N. Y. 105 - - - - - - 65
Buttles v. De Baun 116 W. 323 300
Cable v. Ellis 86 Ill. 525 - 98
Cadden v. Am. S. B. Co. 88 W. 409 - - - - - - 450
Calderwood v. Calderwood's Estate 38 Vt. 171 - - - 189
Callahan v. St. Louis M. B. T. R. Co. 170 Mo. 473 - - 225
Callanan v. Judd 23 W. 343 - 225
Camp v. Ward 69 Vt. 286 - 285
Candee v. W. U. Tel. Co. 34 W. 471 - - - - - - 651
Carberry v. German Ins. Co. 86 W. 323 - - - - - 298
Carmichael v. Argard 52 W. 607 - - - - - - 459
Carpenter v. Murphey 57 W. 541 - - - - - - 403
—— v. Rolling 107 W. 559 - 614
Carter v. Montgomery 2 Tenn. Ch. 455 - - - - - 195
Castello v. Landwehr 28 W. 522 - - - - - - 474
Caston v. Perry 1 Bailey 533 - 577
Cates v. Cates 135 Ind. 272 - 80
Cavanaugh v. Scott 84 W. 93 - 298
Chance v. Isaacs 5 Paige Ch. 592 - - - - - - 102
Charnley v. Shawano W. P. & R. I. Co. 109 W. 563 - - 10
Chase v. Woodruff 133 W. 555 645
Chesapeake & O. R. Co. v. Patton 5 W. Va. 234 - - 9
Chester v. Dorr 41 N. Y. 279 - 89
Chicago & A. R. Co. v. Winters 175 Ill. 293 - - - 596
Chicago, B. & Q. R. Co. v. Gardiner 51 Neb. 70 - - - 652
Chicago, K. & W. R. Co. v. Pontius 157 U. S. 209 223, 225, 247, 249, 341
Chicago, S. F. & C. R. Co. v. McGrew 104 Mo. 282 - - 9
Chippewa B. Co. v. Durand 122 W. 85 - - - - - 672
Clark v. Clark 55 N. J. Eq. 814 573
—— v. Durand 12 W. 223 - 640
—— v. Hackett 1 Cliff. 269 - 273
—— v. Harper 215 Ill. 24 - 189
—— v. Mosher 107 N. Y. 118 44
Clausen v. Head 110 W. 405 - 10
Clay v. Layton 134 Mich. 317 80, 81
—— v. Wood 153 N. Y. 134 - 606
Clemens v. Clemens 28 W. 637 573
Clements v. Collins 2 Term Rep. 498 - - - - 670

Digitized by Google

Clemons v. C., St. P., M. & O. R. Co. 137 W. 387 - 49, 50
Clifford v. State 58 W. 477 - 170
Clifton v. State 73 Ala. 473 - 168
Cobb v. Arundell 26 W. 553 - 311
—— v. State 27 Ga. 648 - - 329
Cochrane v. Willis, L. R. 1 Ch. (App. Cas.) 58 - - - 569
Codde v. Mahiat 109 Mich. 186 289
Colbeth v. Colbeth 117 W. 90 636
Collins v. Smith 75 W. 392 - 376
Colyer v. Clay 7 Beav. 188 - 569
Combes v. Chandler 33 Ohio St. 178 - - - - - - 98
Commercial Nat. Bank v. Henninger 105 Pa. St. 496 - - 497
Common Council v. State 5 Ind. 334 - - - - - 670
Comm. v. Chapman 11 Cush. 422 - - - - - - 330
—— v. Fortune 105 Mass. 592 330
—— v. Webster 5 Cush. 295 - 171
Comm. Mut. F. Ins. Co. v. Hayden 60 Neb. 636 - - 652
Conlin v. Sowards 129 W. 320 606
Connerly v. Planters' & M. Ins. Co. 66 Ala. 432 - - 89
Conrad v. Schwamb 53 W. 372 38
Continental Nat. Bank v. McGeoch 92 W. 286 - - 309
Cook v. Drew 3 Stew. & P. 392 190, 211, 214
Cooper v. M. & P. du C. R. Co. 23 W. 668 - - - 452, 453
Coppins v. Jefferson 126 W. 578 465
Corbett v. Joannes 125 W. 370 411, 415
Corcoran v. Milwaukee G. L. Co. 81 W. 191 - - - 66
Cornell v. State 104 W. 527 - 329, 333, 334
Cornish v. Bryan 10 N. J. Eq. 146 - - - - - - 102
Coster v. Griswold 4 Edw. Ch. 364 - - - - - - 102
Cotzhausen v. Kerting 29 Fed. 821 - - - - - - 289
Covington & L. T. R. Co. v. Sandford 164 U. S. 578 - 219
Crawford v. Halsted 20 Grat. 211 - - - - - - 189
Crook v. First Nat. Bank 83 W. 31 - - - - - - 10
Crowns v. Forest L. Co. 102 W. 97 - - 266, 267, 269, 271
Cullen v. Hanisch 114 W. 24 636
Cupps v. State 120 W. 504 167–169

Daniel v. Mitchell 1 Story 172 572–3
Davey v. Janesville 111 W. 628 29, 35
Davis v. Beckstein 69 N. Y. 440 - - - - - - 98
—— v. C., M. & St. P. R. Co. 93 W. 470 - - - - - 596
—— v. Davis 137 W. 640 - 403
—— v. Schmidt 126 W. 461 - 384
Decker v. McSorley 111 W. 91 29
Dehsoy v. Milwaukee E. R. & L. Co. 110 W. 412 - - 464
Demerit v. Lyford 27 N. H. 541 - - - - - - 289
Denike v. Denike 44 App. Div. 621 - - - - - - 577
Dennis v. State 5 Ark. 230 - 330
Deppe v. C., R. I. & P. R. Co. 36 Iowa 52 - 223, 246, 250, 251
Devin v. Ottumwa 53 Iowa 461 - - - - - - 565
Dickerson v. State 48 W. 288 167
Ditberner v. C., M. & St. P. R. Co. 47 W. 138 - 223, 229, 245, 246, 248
Ditch v. Sennott 116 Ill. 288 - 213
Dodd v. Scott 81 Iowa 319 - 577
Dodge v. Dodge 29 N. H. 177 578
—— v. Mastin 17 Fed. 660 - 531
Dodson v. Dodson 142 Mich. 586 - - - - - - 80
Donges's Estate 103 W. 497 192–3
Donkle v. Milem 88 W. 33 - 635
Donnelly v. Sampson 135 W. 368 - - - - - - 117
Dowell v. Applegate 152 U. S. 327 - - - - - - 577
Downing v. Marshall 37 N. Y. 380 - - - - - - 196
Dreher v. Fitchburg 22 W. 675 52
Du Cate v. Brighton 133 W. 628 - - - - - - 353
Duffy v. C. & N. W. R. Co. 34 W. 188 - - - - - - 666
Dugal v. Chippewa Falls 101 W. 533 - - - - - - 353
Dummer v. Milwaukee E. R. & L. Co. 108 W. 589 - - 50
Duthey v. State 131 W. 178 - 166
Duthie v. Washburn 87 W. 231 - - - - 52, 464

Eastern Wis. R. & L. Co., *In re*, 127 W. 641 - - - - 9
Eaton v. Smith 19 W. 537 - 37
Eau Claire Nat. Bank v. McCauley 101 W. 304 - 188, 255
Edleman v. Edleman 125 W. 270 - - - - 117, 566
Eliot v. Carter 12 Pick. 436 671

Digitized by Google

Ellinger v. Equitable L. A. Soc. 125 W. 643 - - - 392
—— v. —— 132 W. 259 - - 392
Ellwood v. W. U. Tel. Co. 45 N. Y. 549 - - - - - 651
Emerson v. Nash 124 W. 369 34
—— v. Udall 13 Vt. 477 - - 284
Emery v. State 101 W. 627 - 328, 334, 525
Employers' Liability Cases 207 U. S. 463 - 225, 229, 255, 256, 259
Engfer v. Roemer 71 W. 11 - 311
Esch v. C., M. & St. P. R. Co. 72 W. 229 - 14, 15, 17, 22–24
Excelsior W. Co. v. Messinger 116 W. 549 - - - - - 415

Fairbanks v. Holliday 59 W. 77 666
Farwell Co. v. Wolf 96 W. 10 298
Fealey v. Fealey 104 Cal. 354 289
Fearing v. Glenn 73 Fed. 116 208
Fehrman v. Pine River 118 W. 150 - - - 615, 617, 619
Feldschneider v. C., M. & St. P. R. Co. 122 W. 423 - - 596
Ferguson v. Mason 60 W. 377 37
Fertig v. State 100 W. 301 165, 167
Field v. Estate of Mundy 106 W. 383 - - - - - - 403
Fitzgerald v. Weston 52 W. 354 463
Fleming v. Ellison 124 W. 36 298
Flemming v. Hoboken 40 N. J. Law 270 - - - - - 102
Foltz v. Merrill 11 Kan. 479 - 214
Foster v. Wood 6 Johns. Ch. 86 - - - - - - - 284
Fox v. Martin 108 W. 99 - 192
—— v. Wilkinson 133 W. 337 - 384, 441
Fraedrich v. Flieth 64 W. 184 44
Franey v. Warner 96 W. 222 423
Friend v. Yahr 126 W. 291 91, 92
Friese v. Hummel 26 Oreg. 145 - - - - - - 289
Frisbie v. U. S. 157 U. S. 160 230, 231
Fromme v. O'Donnell 124 W. 529 - - - - - - 481
Frost v. Meyer 137 W. 255 - 665
Frye v. Highland 109 W. 292 490

Gaines v. Horrigan 4 Lea (72 Tenn.) 608 - - - - - 540
Galena & S. W. R. Co. v. Ennor 116 Ill. 55 - 272, 283, 298
Gates v. Paul 117 W. 170 - 459
Gehl v. Milwaukee P. Co. 116 W. 263 - - - - - - 353
Genesee Valley C. R. Co. v. Slaight 49 Hun 35 - - 433
Georgia R. & B. Co. v. Miller 90 Ga. 571 - - - 225, 249
German Nat. Bank v. Foreman 138 Pa. St. 474 - - 497
Giblin v. North Wis. L. Co. 131 W. 261 - - - - - - 565
Gibson v. Brockway 8 N. H. 465 - - - - - - - 670
Giese v. Milwaukee E. R. & L. Co. 116 W. 66 - - - - 665
Gilbert v. Stockman 76 W. 62 589
Gillespie v. Russel 3 Macq. 757 576
Glendale Inv. Asso. v. Harvey L. Co. 114 W. 408 - - 672
Glenmavis, The, 69 Fed. 472 652
Glocke v. Glocke 113 W. 303 412
Glover v. Hedges 1 N. J. Eq. 113 - - - - - - - 272
Golden v. Glock 57 W. 118 - 412
—— v. Meier 129 W. 14 - - 96
Goldmann v. Milwaukee E. R. & L. Co. 123 W. 168 - - 50
Goltz v. M., L. S. & W. R. Co. 76 W. 136 - - - - - 65
Goodwin v. Goodwin 3 Atk. 370 - - - - - - - 578
Gott v. Cook 7 Paige 521 - 195
Grams v. C. Reiss C. Co. 125 W. 1 - - - - - - - 347
Granniss, Estate of, 142 Cal. 1 606
Gratz v. Parker 137 W. 104 - 421
Graver v. Faurot 76 Fed. 257 - 291
Graves v. Graves 132 Iowa 199 289, 293
Gray v. Barton 62 Mich. 197 289
Grede v. Dannenfelser 42 W. 78 - - - - - - - - 376
Greene v. Greene 2 Gray 361 288
Gregory v. Hart 7 W. 532 - 459
Grindo v. McGee 111 W. 531 37
Griswold v. Nichols 117 W. 267 - - - - - - - 91
Grunert v. Spalding 104 W. 193 - - - - - 565, 569
Guenther v. State 137 W. 183 362
Guhl v. Whitcomb 109 W. 69 50, 502
Guildhall, The, 58 Fed. 796 - 652
Gumpel v. Castagnetto 97 Cal. 15 - - - - - - - - 574
Gunther v. Ullrich 82 W. 222 353
Gusman v. Hearsey 28 La. Ann. 709 - - - - - 289
Gutzman v. Clancy 114 W. 589 339

Hackley Nat. Bank v. Barry 139 W. 96 - - - - - 415

Digitized by Google

Haetsch v. C. & N. W. R. Co. 87 W. 304 - - - - - 51
Hahn v. Penney 60 Minn. 487 523
Hain v. C., M. & St. P. R. Co. 135 W. 303 - - - - 50
Hale, *Ex parte*, 3 Ves. Jr. 304 102
Hamilton v. McLean 139 Mo. 678 - - - - - - 289
—— v. Menominee Falls Q. Co. 106 W. 352 - - - 533
Hanley v. Hanley 114 Cal. 690 289
Hanlon v. Milwaukee E. R. & L. Co. 118 W. 210 - - 465
Hanson v. Michelson 19 W. 498 38
Hardt v. C., M. & St. P. R. Co. 130 W. 512 - - - - 341
Harrigan v. Gilchrist 121 W. 127 - 198, 202, 300, 302, 423
Harrison v. Colgan 148 Cal. 69 540
Hass v. Billings 42 Minn. 63 282, 289
Haviland v. Willets 141 N. Y. 35 - - - - - - - 573
Hay v. Baraboo 127 W. 1 385, 535
Hayes v. C., M. & St. P. R. Co. 131 W. 399 - - - 52, 474
Haynes v. Kenosha E. R. Co. 139 W. 227 - - - - - 363
—— v. Raleigh Gas Co. 114 N. C. 203 - - - - - - 472
Hebgen v. Koeffler 97 W. 313 423
Heeron v. Beckwith 1 W. 17 636
Heine v. C. & N. W. R. Co. 58 W. 525 - - - - - 453
Hempfling v. Burr 59 Mich. 294 - - - - - - 365
Hempton v. State 111 W. 127 166, 167, 337
Hennesey v. C. & N. W. R. Co. 99 W. 109 - - - - - 464
Hepp v. Huefner 61 W. 148 - 459
Herfurth v. Biederstaedt 43 W. 633 - - - - - - 373
Herman v. Felthousen 114 W. 423 - - - - - - 576
—— v. Gray 79 W. 182 - - 384
Hibbard v. W. U. Tel. Co. 33 W. 558 - - - - - - 651
Hibernia U. R. Co. v. De Camp 47 N. J. Law 518 - - 9
Hicks v. Smith 77 W. 146 - 412
Hiles v. Mosher 44 W. 601 - 271, 272, 277
Hill v. Am. S. Co. 112 W. 627 645
—— v. Durand 58 W. 160 - 312
—— v. M. & H. R. Co. 5 Denio 206 - - - - - - 9, 10
Hilton v. Guyot 159 U. S. 113 289–291
Hobbs v. McLean 117 U. S. 567 - - - - - - - 591
Hodge v. Smith 130 W. 326 96, 659
Hofer v. State 130 W. 576 - 322
Hoffman S. C. Co. v. Cumberland C. & I. Co. 16 Md. 456 364
Hoffmann v. Milwaukee E. R. & L. Co. 127 W. 76 - - 151
Holden, Matter of, 126 N. Y. 589 - - - - - - 196
Holden v. Hardy 169 U. S. 366 231
Holloway v. McIlhenny Co. 77 Tex. 657 - - - - - 195
Holt v. C., M. & St. P. R. Co. 94 W. 596 - - - - - 66
Holtz v. Schmidt 44 N. Y. Super. Ct. 327 - - - 293
Home T. Co. v. Fields 150 Ala. 306 - - - - - - 472
Horn v. C. & N. W. R. Co. 38 W. 463 - - - - 29, 35
Hoseason v. Keegen 178 Mass. 247 - - - - - - 576
Houfe v. Fulton 34 W. 608 - 663
House v. Whitis 5 Baxt. (64 Tenn.) 690 - - - - 197
Hoveland v. Nat. B. Works 134 W. 342 - - - - - 65
Hovey v. Elliott 167 U. S. 409 255
Howard v. Beldenville L. Co. 129 W. 98 - - - - - 345
—— v. —— 134 W. 644 - - 41
Howland v. M., L. S. & W. R. Co. 54 W. 226 - - - - 452
Hoyt v. McLaughlin 52 W. 280 312
Huebschman v. Baker 7 W. 542 - - - - - - 284
Hull v. Augustine 23 W. 383 - 117
Hurd v. Hall 12 W. 112 - - 570
Hutchens v. Covert 39 Ind. App. 382 - - - - - 137
Hutton v. Holbrook, C. & D. C. Co. 139 Fed. 734 - - 65
Hyde v. German Nat. Bank 115 W. 170 - - - 117, 566

Ill. Cent. R. Co. v. McKendree 203 U. S. 514 - - 228
Ill. S. Co. v. Budzisz 106 W. 499 - - - - - - 459
Ill. T. & S. Bank v. Alex. Stewart L. Co. 119 W. 54 - - 461
International & G. N. R. Co. v. Vandeventer (Tex. Civ. App.) 107 S. W. 560 - - 652

Jacks v. Reeves 78 Ark. 426 - 472
Jacobs, Matter of, 98 N. Y. 98 242
Jacobs v. Spalding 71 W. 177 591

Digitized by Google

Jacobsen v. Whitely 138 W. 434 - - - - - - 657
Jambor v. State 75 W. 664 - 321
Jameson v. Hudson 82 Va. 279 540
Janesville v. Carpenter 77 W. 288 - - - - - - 226
Jefferson Co. v. Jones 19 W. 51 312
Jenkins v. Bradley 104 W. 540 117
—— v. C., M. & St. P. R. Co. 41 W. 112 - - - - - 595
Jerdee v. Furbush 115 W. 277 38
Jewell v. C., St. P. & M. R. Co. 54 W. 610 - - - - 353
Jewett v. Dringer 31 N. J. Eq. 586 - - - - - 272, 283
Jilsun v. Stebbins 41 W. 235 272-3
John V. Farwell Co. v. Wolf 96 W. 10 - - - - - 298
Johnson v. Coleman 23 W. 452 271, 277
—— v. Huber 106 W. 282 269, 271
—— v. St. P. & D. R. Co. 43 Minn. 222 - - - 224, 250
—— v. State 129 W. 146 - - 525
Joint School Dist. v. Kemen 72 W. 179 - - - - - - 636
Jones v. De Muth 137 W. 120 312
—— v. Evans 28 W. 168 - - 666
—— v. Jones 68 App. Div. 5 - 298
—— v. —— 171 N. Y. 653 - 298
—— v. Piening 85 W. 264 - 400
—— v. South's Adm'r 3 A. K. Marsh. (10 Ky.) 352 - - 273
—— v. Tobin 135 W. 286 - 488
—— v. Yore 142 Mo. 38 - - 196
Joy v. Walker 29 Vt. 257 - 396
Judson v. Love 35 Cal. 463 - 566

Kager v. Vickery 61 Kan. 342 565
Kaiser v. Nummerdor 120 W. 234 - - - - - - 437
Karney v. Paisley 13 Iowa 89 189
Kaspari v. Marsh 74 W. 562 - 474
Kellogg v. Larkin 3 Pin. 123 - 117
Kempner v. Huddleston 90 Tex. 182 - - - - - 98
Kennedy v. Hoy 105 N. Y. 134 123
Kenney Presby. Home v. Kenney 45 Wash. 106 - - 189
Kensington, The, 183 U. S. 263 652, 653
Kerbaugh v. Vance 5 Lea 113 195
Kessler v. Comm. 12 Bush 18 330
Kiley v. W. U. Tel. Co. 109 N. Y. 231 - - - - - - 651
Killen v. Barnes 106 W. 546 - 298
Kilpatrick v. G. T. R. Co. 74 Vt. 288 - - - - - 231
King v. Graef 136 W. 548 - 437
Kinney v. Dexter 81 W. 80 - 37
Kirtland, *Ex parte*, 49 Ala. 403 298
Kisecker, Estate of, 190 Pa. St. 476 - - - - - - 80
Kittoe v. Willey 121 W. 548 - 676
Klauber v. Wright 52 W. 303 309, 312
Klein v. Valerius 87 W. 54 - 226
Klochinski v. Shores L. Co. 93 W. 417 - - - - - - 353
Knoebel v. North Am. Acc. Ins. Co. 135 W. 424 - - 72
Knott v. Botany Mills 179 U. S. 69 - - - - - - 652
Knoxville I. Co. v. Harbison 183 U. S. 13 - - - - 231
Koester v. C. & N. W. R. Co. 106 W. 460 - - - - - 50
Koetting, *In re*, 90 W. 166 531, 533
Konkel v. Pella 122 W. 143 - 487
Kowalke v. Milwaukee E. R. & L. Co. 103 W. 472 - - 570
Krakow v. Wille 125 W. 284 - 411
Kremer v. Sponholz 129 W. 549 - - - - - - 373
Kretschmar v. Ruprecht 230 Ill. 492 - - - - - - 289
Kujawa v. C., M. & St. P. R. Co. 135 W. 562 - - - 502
Kyle v. Fehley 81 W. 67 - 573

Land, L. & L. Co. v. McIntyre 100 W. 245 - - - - 117
—— v. —— 100 W. 258 - - 271
Lane v. Frawley 102 W. 373 - 298
Lanham v. Lanham 136 W. 360 146
Lanphere v. State 114 W. 193 322
La Pointe v. O'Malley 47 W. 332 - - - - - - 565
Larew v. Newman 81 Cal. 588 540
Last Chance M. Co. v. Tyler M. Co. 157 U. S. 683 - - 569
Lathrop v. Knapp 37 W. 307 - 568
Lauck v. Logan 45 W. Va. 251 80
Lautenshlager v. Lautenshlager 80 Mich. 285 - - - 80
Lavalle v. St. P., M. & M. R. Co. 40 Minn. 249 - - 223, 250
Lawson v. C., St. P., M. & O. R. Co. 64 W. 447 - - 474, 596
Lawton v. Racine 137 W. 593 129
—— v. Steele 152 U. S. 133 - 239
Leach v. Lambeth 14 Ark. 668 400
Leader v. Multnomah Co. 23 Oreg. 213 - - - - - - 9
Leeds v. C. & A. R. Co. 53 N. J. Law 229 - - - - - 9
Legal Tender Cases 52 Pa. St. 9 190
Leighton v. Grant 20 Minn. 345 573

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Leque v. Madison G. & E. Co. 133 W. 547 - - - - - 474
Linde v. Gudden 109 W. 326 - 274
Lindemann v. Rusk 125 W. 210 298
Lipscomb v. State 75 Miss. 559 190, 191, 213
Liverpool & G. W. S. Co. v. Phenix Ins. Co. 129 U. S. 397 652
Livingston v. Bank 26 Barb. 304 - - - - - - 533
Lockwood v. Allen 113 W. 474 437
Loftis v. Butler (Tenn. Ch. App.) 58 S. W. 886 - - 201
Loizeaux v. Fremder 123 W. 193 - - - - - - 98
Long v. State 23 Neb. 33 - 332
Longer, Estate of, 108 Iowa 34 80
Longwell v. Mierow 130 W. 208 461
Loree v. Webster Mfg. Co. 134 W. 173 - - - - - - 415
Losey v. Simpson 11 N. J. Eq. 246 - - - - - - 102
Lowe v. Reddan 123 W. 90 - 497
—— v. Ring 123 W. 370 - - 353
Lucas Co. v. Roberts 49 Iowa 159 - - - - - - 498
Ludington v. Patton 111 W. 208 - - - - - - 271
Lyon v. Park 111 N. Y. 350 - 298

Mabry v. State 50 Ark. 492 - 329
MacCarthy v. Whitcomb 110 W. 113 - - - 452, 453, 566
Mack v. Latta 178 N. Y. 525 - 423
Maddox v. Apperson 14 Lea (82 Tenn.) 596 - - 272, 293
Madison v. Madison G. & E. Co. 129 W. 249 - - - - 422
Mahoney v. State Ins. Co. 133 Iowa 570 - - - - - 289
Manitowoc C. P. Co. v. M., G. B. & N. W. R. Co. 135 W. 94 11
Mann v. Ex'rs of Mann 1 Johns. Ch. 231 - - - - 80
Mannel v. Shafer 135 W. 241 - 437
Marbury v. Madison 1 Cranch 137 - - - - - - 234
Marine Ins. Co. v. Hodgson 7 Cranch 332 - - - 286
Marling v. Nommensen 127 W. 363 - - - - - 91, 92, 98
Marsh v. Case 30 W. 531 - 312
Marshall v. Ender 20 Ill. App. 312 - - - - - - 98
—— v. G. B. & W. R. Co. 125 W. 96 - - - - - - 50
—— v. Holmes 141 U. S. 589 268, 269, 290, 291
Martin v. Beckwith 4 W. 219 309
Marvin v. Anderson 111 W. 387 - - - - - - 533
Maryland S. Co. v. Marney 91 Md. 360 - - - - - 289
Matteson v. Ellsworth 33 W. 488 - - - - - - 373
Mayor, etc. v. Brady 115 N. Y. 599 - - - - - - 286
McArthur v. Kelly 5 Ohio 139 9
McClellan v. Scott 24 W. 81 - 437
McCord v. Sylvester 32 W. 451 9
McCourt v. Peppard 126 W. 326 - - - - - - 80
McCoy v. Milwaukee St. R. Co. 88 W. 56 - - - - 462
McCune v. Norwich City G. Co. 30 Conn. 521 - - - 29
McDowell v. Bank 1 Harr. (Del.) 369 - - - - - 498
McGuire v. C., B. & Q. R. Co. 131 Iowa 340 - - - 231
McIndoe v. Hazelton 19 W. 567 - - - - - - 373
McLain v. Comm. 99 Pa. St. 86 168
McLimans v. Lancaster 63 W. 596 - - - - - - 462
McNeil v. Tenth Nat. Bank 46 N. Y. 325 - - - 98, 100
Meadowcroft v. People 163 Ill. 56 - - - - - - 521
Meinzer v. Racine 74 W. 166 32
Merchants' Exchange Bank v. Luckow 37 Minn. 542 - - 96
Merritt v. Baldwin 6 W. 439 - 284
Mersick v. Aderman 77 Conn. 634 - - - - - - 88
Meyer v. Garthwaite 92 W. 571 - - - - - - 396
—— v. Ladewig 130 W. 566 - 66
Milbrath v. State 138 W. 354 - 423
Miles v. Mut. R. F. L. Asso. 108 W. 421 - - - - 34
Miller v. Hackbarth 126 W. 50 437
—— v. Newark 35 N. J. Law 460 - - - - - - 20
—— v. Seaman 176 Pa. St. 291 483
—— v. State 25 W. 384 - - 334
—— v. —— 139 W. 57 - 535, 615
Minneapolis & St. L. R. Co. v. Herrick 127 U. S. 210 - 223, 225, 247, 249
Missouri Pac. R. Co. v. Haley 25 Kan. 35 - - - - - 246
—— v. Mackey 127 U. S. 205 - 221, 222, 246
Mitchell v. Haggenmeyer 51 Cal. 108 - - - - - 189
Momsen v. Plankinton 96 W. 166 - - - - - - 566

Digitized by Google

Montclair R. Co. v. Benson 36 N. J. Law 557 - - 14, 15
Montgomery v. State 128 W. 183 - - - - - - 166
Moore v. Gulley 144 N. C. 81 272, 273, 293
—— v. Metropolitan Nat. Bank 55 N. Y. 41 - - - - - 98
—— v. Parker 25 Iowa 355 - 272, 273, 283, 292
Morse v. Gilman 16 W. 504 - 34
Morton v. Comp. Gen. 4 S. C. 430 - - - - - - 29
Muench v. Heinemann 119 W. 441 - - - - - - 535
Mugler v. Kansas 123 U. S. 623 - - - - - - 242
Mulligan v. Albertz 103 W. 140 38
Murphy v. Martin 58 W. 276 - 613
—— v. State 108 W. 112 - - 337
Murray v. Lylburn 2 Johns. Ch. 441 - - - - - - 102
Murray Hill L. Co. v. Milwaukee L., H. & T. Co. 126 W. 14 9
Mutter v. Chauvel 5 Russ. 42 578

Nagle v. Hake 123 W. 256 - 472
Nash v. Hoxie 59 W. 384 - 613
Nass v. Schulz 105 W. 146 52, 464
Naylor v. C. & N. W. R. Co. 53 W. 661 - - - - - 452
Nelson v. First Nat. Bank 70 Fed. 526 - - - 272, 292
Neun v. Blackstone B. & L. Asso. 149 Mo. 74 - - - 289
Nevil v. Clifford 55 W. 161 271, 278
Newark E. L. & P. Co. v. Ruddy 62 N. J. Law 505 - 472
New York City v. Pine 185 U. S. 93 - - - - - - 129
New York, L. & W. R. Co., Petition of, 49 Hun 539 - 13
New York Mut. L. Ins. Co. v. Armstrong 117 U. S. 591 - 641
Nichols v. Chandler 55 Ga. 369 80
—— v. Emery 109 Cal. 323 - 80
—— v. Walter 37 Minn. 264 - 238
Norfolk R. & L. Co. v. Spratley 103 Va. 379 - - - 472
Norfolk & W. R. Co. v. Perdue 40 W. Va. 442 - - 98
North Bergen v. Eager 41 N. J. Law 184 - - - - 102
North Pac. L. Co. v. Spore 44 Oreg. 462 - - - - - 591
North Side L. & B. Soc. v. Nakielski 127 W. 539 - - 395
Northern Pac. R. Co. v. Kempton 138 Fed. 992 - - - 652
Northern S. Co. v. Wangard 117 W. 624 - - - - - 437
Nutting v. Minn. F. Ins. Co. 98 W. 26 - - - - - 96
Nye v. Sochor 92 W. 40 - 266, 272, 278

Oakley v. Aspinwall 1 Duer 1 214
Oatman v. Bond 15 W. 20 - 226
O'Boyle v. State 100 W. 296 - 322
O'Connell v. Reg. 11 Clark & Fin. 155 - - - - - 334
Odegard v. North Wis. L. Co. 130 W. 659 - - - - 353
O'Dell v. Rogers 44 W. 136 - 194
Odette v. State 90 W. 258 167, 329
Ogle, Estate of, 97 W. 56 - 80
Old Colony R. Co. v. Miller 125 Mass. 1 - - - - 13
Oldham v. Cooper 5 Del. Ch. 152 - - - - - - 273
Olson v. Doherty L. Co. 102 W. 264 - - - - - - 66
Omaha Nat. Bank v. Johnson 111 W. 372 - - - - 497
O'Niel v. G. N. R. Co. 80 Minn. 27 - - - - - - - 250
Opitz v. Karel 118 W. 527 - 640
Orcutt v. N. P. R. Co. 45 Minn. 368 - - - - - - 596
Oregon S. L. R. Co. v. Fox 28 Utah 311 - - - - - 13
Osborn v. Blackburn 78 W. 209 - - - - - - 117
Osgood v. State 64 W. 472 - 322
Ott v. Boring 131 W. 472 - 265

Pabst B. Co. v. Milwaukee 126 W. 110 - - - - 309, 314
Paine v. Electric I. & P. Co. 64 App. Div. 477 - - - 472
Palmer v. Banfield 86 W. 441 384
—— v. Goldberg 128 W. 103 - 441
Park v. M., St. P. & S. S. M. R. Co. 114 W. 347 - - 38
Parker v. Conner 93 N. Y. 118 98
Parry Mfg. Co. v. Tobin 106 W. 286 - - - - - - 441
Paterson v. Bangs 9 Paige 627 286
Patterson v. Bark Eudora 190 U. S. 169 - - - - - 230
—— v. English 71 Pa. St. 454 80
Patton v. Patrick 123 W. 218 - 125
Paulson v. State 118 W. 89 - 365
Peagram v. King 2 Hawks 295 272
—— v. —— 2 Hawks 605 - 273
Peake v. Superior 106 W. 403 619
Peale v. Addicks 174 Pa. St. 543 - - - - - - 89

Digitized by Google

Pearsall v. W. U. Tel. Co. 124 N. Y. 256 - - - - - 651
Pearson v. C., M. & St. P. R. Co. 47 Minn. 9 - - - 250
Pease v. C. & N. W. R. Co. 61 W. 163 - - - - - - 452
Peerless R. Co. v. Conway 79 W. 622 - - - - - 384
Peirce v. Van Dusen 78 Fed. 693 - - - - 223, 247
Pendleton v. Beyer 94 W. 31 - 400
Peninsular L. & C. Works v. Union O. & P. Co. 100 W. 488 - - - - - 188, 255
Pennsylvania Co. v. Kennard G. & P. Co. 59 Neb. 435 - 652
People v. Batterson 50 Hun 44 330
—— v. Chapman 62 Mich. 280 330
—— v. Dumar 106 N. Y. 502 331
—— v. Flaherty 162 N. Y. 532 331
—— v. Flynn 96 Mich. 276 - 330, 334
—— v. Hawkins 106 Mich. 479 365
—— v. North River S. R. Co. 121 N. Y. 582 - - - 364
People *ex rel.* Bentley v. Le Fevre 21 Colo. 218 - - 540
—— Reilly v. Johnson 38 N. Y. 63 - - - - - - 568
—— Sheppard v. Ill. State Board 110 Ill. 180 - - 62
Peoria, P. & J. R. Co. v. Black 53 Ill. 33 - - - - - 9
Pepin v. Lautman 28 Ind. App. 74 - - - 289
Peschel v. C., M. & St. P. R. Co. 62 W. 338 - - - 452
Peshtigo L. Co. v. Ellis 122 W. 433 - - - - - - 412
Pettit v. May 34 W. 666 - 29, 35
Pflueger v. State 46 Neb. 493 329
Phillips v. Hyland 102 W. 253 376
Phipps v. Wis. Cent. R. Co. 133 W. 153 - - - - 219, 473
Phœnix Mut. L. Ins. Co. v. Walrath 53 W. 669 - - 461
Pico v. Cohn 91 Cal. 129 - 268, 289
Pierce v. Atwood 67 Neb. 296 497
—— v. C. & N. W. R. Co. 36 W. 283 - - - - - - 117
Piper v. C., M. & St. P. R. Co. 77 W. 247 - - - - - 502
Pitney v. Bolton 45 N. J. Eq. 639 - - - - - - 591
Pittsburg M. Co. v. Spooner 74 W. 307 - - - - - 423
Pittsburgh, C., C. & St. L. R. Co. v. Keokuk & H. B. Co. 107 Fed. 781 - - - 291
Pittsburgh, C., C. & St. L. R. Co. v. Montgomery 152 Ind. 1 - - - - - 225, 248, 249
Plankinton v. Gorman 93 W. 560 - - - - - - 497
Pointer v. U. S. 151 U. S. 396 168
Pollock v. C. Hennicke Co. 64 Ark. 180 - - - - - 212
Pott v. Schmucker 84 Md. 535 363
Powell v. Hogue 8 B. Mon. 443 400
—— v. Plant (Miss.) 23 South. 399 - - - - - - 573
Prairie Grove C. Mfg. Co. v. Luder 115 W. 20 - - - 310
Prentice v. Nelson 134 W. 456 34, 35
Price Co. Bank v. McKenzie 91 W. 658 - - - - - - 497
Pritchard v. Lewis 125 W. 604 410
—— v. Norton 106 U. S. 124 255
Pumorlo v. Merrill 125 W. 102 465

Quackenbush v. Wis. & M. R. Co. 62 W. 411 - - - 229
—— v. —— 71 W. 472 - - 229
Queenan v. Palmer 117 Ill. 619 532
Quiggle v. Herman 131 W. 379 228

Rahles v. J. Thompson & Sons Mfg. Co. 137 W. 506 - - 347
Raisbeck v. Anthony 73 W. 572 - - - - - 510, 511
Randall v. Rovelstad 105 W. 410 - - - - - 490, 491
Rape v. Heaton 9 W. 328 117, 566
Rapps v. Gottlieb 142 N. Y. 164 100
Rauwolf v. Glass 184 Pa. St. 237 - - - - - - 578
Rawson v. Milwaukee Mut. L. Ins. Co. 115 W. 641 - - 640
Read's Adm'rs v. Cramer 2 N. J. Eq. 277 - - - - - 572
Reg. v. Crisham, Carr. & M. 187 - - - - - 330
Reisz v. Supreme Council 103 W. 427 - - - - 72, 74
Relyea v. Tomahawk P. & P. Co. 110 W. 307 - - - 347
Remington v. Ward 78 W. 539 672
Rich v. Flanders 39 N. H. 304 188, 190
Richards v. Moran 137 Iowa 220 - - - - - - 289
Richardson v. Tyson 110 W. 572 - - - - - 197, 198
Riegel v. Am. L. Ins. Co. 140 Pa. St. 193 - - - - - 570
—— v. —— 153 Pa. St. 134 - 570
Ringenoldus v. Abresch 119 W. 410 - - - - - - 497

Digitized by Google

Ritchie v. McMullen 79 Fed. 522 - - - - - - 289
Roanoke City v. Berkowitz 80 Va. 616 - - - - - 9, 13
Robinson, Matter of, 40 App. Div. 30 - - - - - - 196
—— —— 160 N. Y. 448 - - 196
Robinson v. Bank of Pikeville 108 Ky. 389 - - - - - 298
Rogers v. Smith 4 Pa. St. 93 - 671
Rose v. Bradley 91 W. 619 309, 311
Ross v. Wood 70 N. Y. 8 - 286
Rowell v. Smith 123 W. 510 - 569, 577
Rowley v. C., M. & St. P. R. Co. 135 W. 208 - 466, 469, 470
Rudiger v. C., St. P., M. & O. R. Co. 101 W. 292 - - 474
Ryan D. Co. v. Hvambsahl 92 W. 62 - - - - - - 311

St. Clara F. Acad. v. N. W. Nat. Ins. Co. 101 W. 464 - 461
St. Paul, M. & M. R. Co. v. Eckel 82 Minn. 278 - - 298
St. Sure v. Lindsfelt 82 W. 346 117
Sartor v. Sartor 39 Miss. 760 - 80
Scheer v. Ulrich 133 W. 311 - 292
Schermeely v. S. & St. P. R. Co. 16 Minn. 506 - - - 9
Schintgen v. La Crosse 101 W. 208 - - - - - - 129
Schmidt v. Menasha W. W. Co. 92 W. 529 - - - 421
Schneider v. C., M. & St. P. R. Co. 99 W. 378 - - 50
Schoenberg v. Adler 105 W. 645 - - - - - - 117
Schroeder v. Wis. Cent. R. Co. 117 W. 33 - - - - - 50
—— v. Young 161 U. S. 334 - 376
Schrunk v. St. Joseph 120 W. 223 - - - - - 464, 465
Schultz v. C. & N. W. R. Co. 67 W. 616 - - - - 453
Schumacher v. Draeger 137 W. 618 - - - - - 676
Schuylkill N. Co. v. Berks Co. 11 Pa. St. 202 - - - 433
Schwickerath v. Lohen 48 W. 599 - - - - - - 396
Scott v. Coulson [1903] 1 Ch. 453 - - - - - - 569
Second Ward Sav. Bank v. Schranck 97 W. 250 - 188, 255
Seefeld v. C., M. & St. P. R. Co. 67 W. 96 - - - 14, 15
Segelke & K. Mfg. Co. v. Vincent 135 W. 237 - - - 312
Seligmann v. Heller Bros. C. Co. 69 W. 410 - - - - 400
Senour Mfg. Co. v. Clarke 96 W. 469 - - - - - - 44
Seymer v. Lake 66 W. 651 - 463
Shackelton v. Sebree 86 Ill. 616 80
Shannon v. People 5 Mich. 71 331
Sharp v. Hall 86 Ala. 110 79, 80
Shaw v. Gilbert 111 W. 165 353, 533
Shelton v. Am. S. Co. 127 Fed. 736 - - - - - - 498
Shepardson v. Cary 29 W. 34 576
Sherman v. Menominee R. L. Co. 77 W. 14 - - - - 353
Shollenberger v. Brinton 52 Pa. St. 10 - - - 208, 211
Simanek v. Nemetz 120 W. 42 636
Simons v. Morris 53 Mich. 155 89
Simpson v. Del Hoyo 94 N. Y. 189 - - - - - - 98
—— v. Willard 14 S. C. 191 - 540
Skerrett, Estate of, 67 Cal. 585 80
Slaughter v. Bernards 88 W. 111 - - - - - - 566
Slocum v. N. W. Nat. L. Ins. Co. 135 W. 288 - - - 640
Smeesters v. Schroeder 123 W. 116 - - - - - 384, 441
Smiley v. Kansas 196 U. S. 447 231
Smith v. Babcock 2 Woodb. & M. 246 - - - - - - 574
—— v. C., M. & St. P. R. Co. 124 W. 121 - - - - - 151
—— v. —— 137 W. 97 - - 49
—— v. Dickinson 100 W. 574 400
—— v. Dragert 65 W. 507 - 459
—— v. Holden 58 Kan. 535 - 80
—— v. Hughes, L. R. 6 Q. B. 597 - - - - - - 569
—— v. Lowry 1 Johns. Ch. 320 285, 287
—— v. Scott 31 W. 437 - - 412
—— v. Smith 69 Ill. 308 195, 201
—— v. U. S. 5 Pet. 292 - 190, 213
Somervaill v. McDermott 116 W. 504 - - - - - - 396
South Milwaukee Co. v. Murphy 112 W. 614 - - - 34
Southwick v. Southwick 49 N. Y. 510 - - - - - - 189
Sprague v. N. P. R. Co. 122 W. 509 - - - - 9, 12, 13
Speiser v. Merchants' Exch. Bank 110 W. 506 - - 198, 199
Stafford v. Chippewa Valley E. R. Co. 110 W. 331 - - 464
Stark v. Starr 94 U. S. 477 - 577
State v. Allen 47 Conn. 121 - 329
—— v. Bailey 31 Wash. 89 - 166

Digitized by Google

State v. Beach 147 Ind. 74 - 532
—— v. Brown & S. Mfg. Co. 18 R. I. 16 - - - - - 231
—— v. Cadwell 79 Iowa 432 - 531
—— v. C., M. & St. P. R. Co. 136 W. 407 - - - - - 256
—— v. Clements 82 Minn. 434 533
—— v. Comstock 46 Iowa 265 330
—— v. Dolan 17 Wash. 499 170, 171
—— v. Evans 130 W. 381 224, 243
—— v. Gifford 19 Wash. 464 - 331
—— v. Handy (Del.) 66 Atl. 336 - - - - - - 334
—— v. Harris 150 Mo. 56 - 330
—— v. Jordan 110 N. C. 491 - 330
—— v. Lloyd 133 W. 468 - 490
—— v. McPhail 39 Wash. 199 166
—— v. Milwaukee E. R. & L. Co. 136 W. 179 - - - 422
—— v. Myers 54 Kan. 206 - 532
—— v. Pruitt 202 Mo. 49 - 333
—— v. Redmon 134 W. 89 239, 242
—— v. Romano 41 Wash. 241 171
—— v. Shear 51 W. 460 - - 337
—— v. Shove 96 W. 1 - 521, 531
—— v. Wis. Cent. R. Co. 133 W. 478 - - - - - - 645
—— v. Wood 124 Mo. 412 - 166
State *ex rel.* v. Schmidt 14 Mo. App. 589 - - - - - 540
—— v. Standard O. Co. 49 Ohio St. 137 - - - - - - 364
—— Augusta v. Losby 115 W. 57 - - - - - - - 480
—— Burns v. Elba 34 W. 169 30
—— Chandler v. Main 16 W. 398 - - - - - - - 228
—— Coffey v. Chittenden 112 W. 569 - - - - - - 62
—— Cook v. Houser 122 W. 534 138, 635
—— Cornish v. Tuttle 53 W. 45 228
—— Crawford v. Hastings 10 W. 525 - - - - - - 546
—— Cuppel v. Milwaukee C. of C. 47 W. 670 - - - 30
—— Gubbins v. Anson 132 W. 461 - - - - - - 535
—— Jones v. Cham. of Comm. 121 W. 110 - - - - - 96
—— J. S. Stearns L. Co. v. Fisher 124 W. 271 - - 480
—— Leiser v. Koch 138 W. 27 627
—— Lightfoot v. McCabe 74 W. 481 - - - - - - 663
—— Manitowoc v. County Clerk 59 W. 15 - - - 138
—— Milwaukee Med. Coll. v. Chittenden 127 W. 468 - 524
State *ex rel.* N. C. Foster L. Co. v. Williams 123 W. 61 - - 480
—— Risch v. Trustees 121 W. 44 - - - - - - - 237
—— Starkweather v. Superior 90 W. 612 - - - - - 635
—— Weiss v. District Board 76 W. 177 - - - 117
Stebbins v. Eddy 4 Mason 414 574
Steen v. March 132 Cal. 616 - 289
Stephenson v. Norris 128 W. 242 - - - - - 192, 197
Stittgen v. Rundle 99 W. 78 29, 35
Stork v. Charles Stolper C. Co. 127 W. 318 - - - 65, 347
Storke v. Goux 129 Cal. 526 - 540
Stowell v. Eldred 26 W. 504 266, 269, 271–273, 277–279, 281, 283, 284, 286, 287, 291, 292, 294
Strang v. People 24 Mich. 1 - 330
Stricker v. Reedsburg 101 W. 457 - - - - - - - 491
Strickland v. Turner 7 Exch. 208 - - - - - - 570
Strong v. Hooe 41 W. 659 - 565
Supples v. Cannon 44 Conn. 424 - - - - - - 575
Sutton v. Facey 1 Mich. 243 - 60

Tabor v. Tabor 85 W. 313 - 606
Talledega Ins. Co. v. Landers 43 Ala. 115 - - - - 189
Terney v. Wilson 45 N. J. Law 282 - - - - - - 102
Terrible M. Co. v. Argentine M. Co. 89 Fed. 583 - - 510
Tesch v. Milwaukee E. R. & L. Co. 108 W. 593 - 50, 51
Thompson v. Myrick 24 Minn. 4 - - - - - - - 577
Thorn v. Smith 71 W. 18 - 459
Thorne v. Ætna Ins. Co. 102 W. 593 - - - - - - 96
Tobey v. Taunton 119 Mass. 404 - - - - - - 20
Toledo, A. A. & N. M. R. Co. v. Munson 57 Mich. 42 - 9
Toner v. C., M. & St. P. R. Co. 69 W. 188 - - - 452, 453
Tooke, Trial of, 25 How. St. Tr. 1 - - - - - - 813
Tovey v. Young, Finch's Prec. in Ch. 193 - - - - 274
Town v. Gensch 101 W. 445 37, 38
Tucker v. Whittlesey 74 W. 74 269, 272, 273, 278
Tullis v. L. E. & W. R. Co. 175 U. S. 348 - - 222, 247
Turner v. Scott 51 Pa. St. 126 80

Digitized by Google

Two Rivers Mfg. Co. v. Day 102 W. 328 - - - - 98
Tyner v. Cotter 67 W. 482 - 437
Tyson v. Richardson 103 W. 397 - - 191, 194, 195, 201

Uecker v. Thiedt 133 W. 148 267, 272, 291, 292, 294
Union Ins. Co. v. Van Rensselaer 4 Paige 85 - - - 195
Union L. & E. Co. v. Erie R. Co. 37 N. J. Law 23 - - 652
U. S. v. Cent. Pac. R. Co. 118 U. S. 235 - - - - - 591
—— v. Flint 4 Sawy. 42 - 289
—— v. Gleeson 90 Fed. 778 289-91
—— v. Throckmorton 98 U. S. 61 - 267-269, 287, 288, 290-294
—— v. White, 9 Sawy. 125 - 289

Van den Heuvel v. Nat. F. Co. 84 W. 636 - - - - - 65
Van Horn's Lessee v. Dorrance 2 Dall. 304 - - - - - 13
Van Steenwyck v. Sackett 17 W. 645 - - - - - - 373
Van Trott v. Wiese 36 W. 439 384
Van Zandt v. Argentine M. Co. 8 Fed. 725 - - - 510
Veazie v. Williams 3 Story 54 578
Venable v. Burton 129 Ga. 537 573
Verplanck v. Van Buren 11 Hun 328 - - - - - 289
Vilas v. Mason 25 W. 310 - 459
Vogel v. State 138 W. 315 - 561
Vogt v. Schienebeck 122 W. 491 - - - - - - 481
Voss v. N. W. Nat. L. Ins. Co. 137 W. 492 - - - - 309
Vought v. State 135 W. 6 - 535

Wabash R. Co. v. Mirrielees 182 Mo. 126 - - - - - 289
Wade v. Odle 21 Tex. Civ. App. 656 - - - - - - 671
Walkenshaw v. Perzel 32 How. Pr. 233 - - - - - 533
Walker v. Hallett 1 Ala. 379 - 195
Walsh v. Dart 12 W. 635 - 566
Walter A. Wood R. & M. Co. v. Stenel 71 W. 71 - - 666
Walters v. Denver C. E. L. Co. 17 Colo. App. 192 - - 472
Walton v. Yore 58 Mo. App. 562 - - - - - 195, 196
Wanner v. Wanner 115 W. 196 - - - - - - 412
Ward v. Jefferson 24 W. 342 615, 617-619
Ward v. M. & St. P. R. Co. 29 W. 144 - - - - - - 464
Warder, B. & G. Co. v. Gibbs 92 Mich. 29 - - - - 89
Ware v. Smith 62 Iowa 159 - 96
Wareham v. Sellers 9 Gill & J. 98 - - - - - - 80
Washburn v. M. & L. W. R. Co. 59 W. 364 - - 17, 21-25
Waterman v. C. & A. R. Co. 82 W. 613 - - - - - 596
Watermolen v. Fox River E. R. & P. Co. 110 W. 153 - 50
Waters v. McGuigan 72 W. 155 591
Watkins v. Landon 67 Minn. 136 - - - - - - - 282
Watson v. M. & M. R. Co. 57 W. 332 - - - 14, 17, 21-24
Waupaca E. R. & L. Co. v. Milwaukee E. R. & L. Co. 112 W. 469 - - - - - - 441
Webster v. Potter 105 Mass. 414 - - - - - - 671
Weed v. Paine 31 Hun 10 - 195
Weidner v. Standard L. & A. Ins. Co. 130 W. 10 - 310, 591
Weisel v. E. R. Co. 79 Minn. 245 - - - - - - 250
Wells v. Wells 132 W. 73 - 676
Wentworth v. Racine Co. 99 W. 26 - - - - - - 569
West v. St. Paul Nat. Bank 54 Minn. 466 - - - - 523
Westerman v. Westerman 25 Ohio St. 500 - - - - 189
White v. Denman 1 Ohio St. 110 - - - - - - 574
—— v. Hopkins 80 Ga. 154 - 80
Whiting v. Hoglund 127 W. 135 - - - - - - 676
Whitmore v. Hay 85 W. 240 37, 38, 80
Whitney v. Bayer 101 Mich. 151 - - - - - - 577
Wier v. Simmons 55 W. 637 - 591
Wilbert v. Sheboygan L., P. & R. Co. 129 W. 1 - - 472
Wildman v. Wildman 70 Conn. 700 - - - - - - 575
Willey v. Hodge 104 W. 81 - 38
Williams v. Jones 131 W. 361 410, 412
—— v. State 61 W. 281 - 321, 334
—— v. Sturdevant 27 Ala. 598 574
—— v. Williams 63 W. 58 - 117
Wilson v. Carrico 140 Ind. 533 80
—— v. Exchange Bank 122 Ga. 495 - - - - - 400
—— v. Hicks 40 Ohio St. 418 98

Digitized by Google

Wilson v. Hunter 14 W. 683 - 670
—— v. Runkel 38 W. 526 - 312
Winn v. State 82 W. 571 - 167
Winnisimmet Co. v. Grueby 111 Mass. 543 - - - 14
Winter v. Winter 101 W. 494 403
Wis. F. L. Co. v. Bullard 119 W. 320 - - - - - 462
Wis. F. & M. Ins. Co. Bank v. Mann 100 W. 596 - - 577
Wiskie v. Montello G. Co. 111 W. 443 - - - 443, 448–451
Wolf River L. Co. v. Brown 88 W. 638 - - - - 578
Wolpers v. N. Y. & Q. E. L. & P. Co. 91 App. Div. 424 - 472
Wood v. Chapin 13 N. Y. 509 - - - - - - 214
—— v. Kaufman 135 Mich. 5 189
—— v. Mann 2 Sumn. 316 - 578
—— v. Wilmington C. R. Co. 5 Pennewill (Del.) 369 - 472
Wood R. & M. Co. v. Stenel 71 W. 71 - - - - - 666
Woodruff v. Johnston 19 N. Y. Supp. 861 - - 273, 289, 293
Workman v. Ins. Co. 2 La. 507 671
Wright v. State 3 Heisk. (50 Tenn.) 256 - - - - - 197
Wyatt v. Larimer & W. I. Co. 18 Colo. 298 - - - 591
Wyman v. Brown 50 Me. 139 80
Wysocki v. Wis. Lakes I. & C. Co. 121 W. 96 - - - 615

Young v. W. U. Tel. Co. 65 N. Y. 163 - - - - 651
Yourie v. Nelson 1 Tenn. Ch. 614 - - - - - - 195

Zimmer v. Fox River V. E. R. Co. 118 W. 614 - - - 462
Zinc C. Co. v. First Nat. Bank 103 W. 125 269–271, 278, 423, 424

STATUTES CITED.

Constitution of Wisconsin.

Art. I, sec. 1 - - - 218
" I, " 4 - - 173, 177
" I, secs. 9, 13, 22 - 218
" IV 542, 544, 545, 547, 556
" IV, sec. 10 - - - 542
" IV, " 12 - - - 558
" IV, " 26 - 536, 537, 546–550, 553–558, 560
" VI, " 2 - - 174, 178
" VII - 536, 537, 543–549, 553, 555, 556
" VII, " 1 [4] - - 541
" VII, " 2 - 174, 216, 225
" VII, " 9 - - - 543
" VII, " 10 - 541, 543, 558
" VIII, " 6 - - - 178
" VIII, " 8 - - 174, 177

Session Laws.

1847. Page 104 - - - - 428
1854. Ch. 41 - - - - 546
1857. " 102 - - - 546–548
1860. " 260 - - - - 509
1867. " 33 - - 548, 549, 559
1868. " 145 - - - 549, 559
1872. " 117 - - - - 509
1873. " 293 - - - 553, 559
1875. " 173 - - - 223, 229
1897. " 264 - - - 54, 56, 60
1897. " 264, sec. 7 - - 61

Session Laws — con.

1899. Ch. 39 - - - - 392
1899. " 87 - - 53, 54, 57, 60
1899. " 265, sec. 8 - - 139
1899. " 265, " 9 133, 137, 140
1899. " 356 - - - - 100
1901. " 138 - - - 553–555
1901. " 244 - - - - 392
1901. " 397 - - - - 193
1901. " 414 - - - 553–555
1903. " 309 - - - - 669
1903. " 397 - - - 137, 138
1903. " 397, sec. 8 - 133, 136, 138, 139, 141, 142
1903. " 397, sec. 9 - 133, 135, 137, 138, 140
1903. " 448 - - - 340, 341
1905. " 45 - - - - 37
1905. " 82, sec. 1 - 579, 581
1905. " 362 - - 585, 590, 592
1905. " 362, sec. 4 - 590, 591
1905. " 362, " 4, subd. c - 590
1905. " 362, " 22 - - 590
1905. " 419, " 1 - - 626
1905. " 419, " 1, subd. 6 624
1905. " 419, " 8 - 625, 626
1905. " 419, " 8, subd. 7 624
1905. " 419, " 9 - 625, 626
1905. " 419, " 10 621, 624–627
1905. " 419, " 13 - - 625
1905. " 419, " 18 - - 626

Digitized by Google

SESSION LAWS — con.

1905. Ch. 419, sec. 20 - 625, 626
1905. " 419, " 35 - - 624
1905. " 419, " 39 621, 625–627
1905. " 422 - - - 53, 57, 58
1907. " 197 - - - 179, 188
1907. " 254 - 215–219, 221, 235
1907. " 267 - - 180, 191
1907. " 271 - - - 467, 473
1907. " 346 - - - 599, 602

STATUTES (1898 and since).

Sec.	Page.
11—1 to 11—28 - - - -	173
127 - - - - - -	178
776, 778, 779 - - - -	669
1326 - - - - -	484, 487
1330 - - - - -	484, 487
1339 - - - - - -	620
1379—11 *et seq.* - - -	622
1379—20 (Supp. 1906) - -	621
1379—24 - - - - - -	622
1379—31*r* (Supp. 1906) - -	621
1435*f* - - - - -	61
1647 - - - - - -	507
1647–1657 (ch. 75) - - -	509
1649 - - - - - -	507, 510
1675 (Supp. 1906) - - -	89
1675–1684—7 (Supp. 1906) -	88
1675—55 (Supp. 1906) -	87, 89
1676—19 (Supp. 1906) - -	100
1676—22 (Supp. 1906) - -	89
1676—28 (Supp. 1906) -	89, 100
1679— 2 (Supp. 1906) - -	89
1764 - - - - -	112, 117
1770*b* - - - 377,	379, 380
1778 - - - - -	648, 653
1785 - - - - -	628, 634
1810 - - - - - -	1
1816 - - 217, 218,	340, 341
1816 (L. 1907, ch. 254) -	215, 217
1816, subd. 1, 2 (L. 1907, ch. 254)	218, 235
1816, " 3 (L. 1907, ch. 254)	216, 227, 228
1816, " 4 (L. 1907, ch. 254)	216, 228
1816, " 5 (L. 1907, ch. 254)	216, 225–228
1816, " 6 (L. 1907, ch. 254)	216, 229, 231

STATUTES (1898 and since) — con.

Sec.	Page.
1816, subd. 8 (L. 1907, ch. 254)	216, 231, 254
1816, " 9 (L. 1907, ch. 254)	218, 235
1848 - - - - - -	21
2025–2070 (ch. 95) - - -	124
2037 - - - - - -	124
2038, 2039 - - -	121, 125
2060 - - - - -	120, 124
2071 - - - - -	123
2071–2100*a* (ch. 96) - -	123
2081 - - - - -	120, 123
2089, 2091 - - -	121, 125
2203 - - - - -	36, 37
2533*c* - - - - -	328
2533*d* - - - -	315, 328
2605 - - - - - -	398
2606 - - - - - -	399
2656, subd. 3 - - - -	399
2687 - - - - - -	578
2804, 2805 - - - -	562, 566
2829 - - - 315,	329, 465
2830 - - - 455,	459, 460
2858*m* - - - -	599, 602
2864, subd. 3 - - -	369, 376
2872 - - - - -	635
2879 - - - - - -	266
2898 - - - - - -	635
2969, 2971 - - -	368, 374
3070 - - - - -	635
3071 - - - - -	385, 535
3074 - - - - - -	37
4068 - - - - -	467, 473
4069 - - - - -	641, 646
4096 - - - - -	392, 442
4096 (Supp. 1906) -	390–392, 416, 417, 420, 425
4183 - - - - - -	392
4222, subd. 5 - -	148, 150, 152
4258 - - - - - -	399
4258, subd. 5 - - - -	399
4264 - - - - - -	399
4541 - - 513–515,	520, 530, 534
4613 - - - - - -	330
4614 - - - - - -	331
4659 - - - - -	315, 329
4971 subd. 1 - - - - -	136

Digitized by Google

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Archbold, Crim. Prac. (Pom. 8th ed.) 1000 (*304) - - 330

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2 Bishop, New Crim. Proc. (4th ed.) § 3 - - - 330
Bishop, Stat. Crimes, § 139 - 332
Black, Judgments (2d ed.) §§ 365-387 - - - - 280
—— § 372 - - - - - 281
2 Black, Judgments, § 599 - 565
—— §§ 609, 621 - - - 578
—— § 734 - - - - 577
2 Bouvier, Law Dict. 768 - 332
Brannan, Neg. Inst. Law - 88
Bunker, Neg. Inst. Law - - 88

37 Cent. L. J. 147 - - - 532
2 Cook, Corp. § 738 - - 117
3 Cooley, Briefs on Ins. 2707 - 74
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15 Cyc. 783 - - - - 13
22 Cyc. 374 - - - - 330

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—— (5th ed.) § 726 - - 88

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22 Ency. Pl. & Pr. 1303, 1304 120

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—— § 489 - - - 280, 281
—— §§ 488-496 - - - 280

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Kerr, Fraud & M. 433 - - 571
—— (3d Eng. ed.) 434, 440 - 574

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—— § 505 - - - - - 13

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McQuillan, Mun. Ord. § 374 - 29

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IN MEMORIAM.

WILLIAM M. TOMKINS.

On the 20th day of April, 1909, Mr. Richard Sleight of Ashland addressed the court and presented the following memorial of the bar of Ashland county, prepared by Mr. George F. Merrill of Ashland:

Memorial of the Ashland County Bar.

On the 16th day of May, 1907, WILLIAM M. TOMKINS departed this life after having suffered a long illness.

He was born at Loosely Row, Buckinghamshire, England, February 24, 1845. His father, William Tomkins, was a Methodist clergyman, who brought his family to this country and located at Shullsburg, Wisconsin, in 1850. The childhood of WILLIAM M. TOMKINS was not different from that of nearly all children of country Methodist ministers. The family lived in nearly every village of what is known as the "lead region" of Wisconsin. The poverty and sacrifice of the family of a Methodist preacher were theirs. The education of the children was that of the common school and such other as was acquired by their own efforts. Mr. TOMKINS attended the common schools where his father resided. He prepared for college at an academy located at Lone Rock, Wisconsin, and he attended the State University at Madison one year, but was obliged to stop on account of lack of funds. While acquiring an education he spent his vacations at work on farms. He married Elizabeth A. Pierce in 1872, and in 1873 he came to Ashland.

At that time Ashland was a small village having a population of only a few hundred. There were no railroads entering the village, and Mr. TOMKINS walked from Superior to Ashland. It seemed then to be out of the world, but the people thought that the natural resources of the surrounding country and its location upon Lake Superior gave promise of a future city, and Mr. TOMKINS determined to cast his lot with them. When he arrived at Ashland he had no money and a family to support, but he was willing to work and ambitious for the future. His first work was digging stumps in the street. He soon demonstrated an ability and capacity for something

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better, and was made justice of the peace and town clerk. He immediately took up the study of law and was admitted to the bar of Ashland county in 1875.

In those early days the retainers for the lawyer were few, and the law did not afford sufficient income to support his family. He did quite an amount of work outside of his profession. By examination of the records of Ashland county we find that he held nearly every office in the county, either as principal or deputy. He was elected district attorney soon after his admission to the bar, and the knowledge and experience acquired by him in his work then was invaluable to him in after years as a practitioner.

In the year 1883 the firm of Tomkins & Merrill was formed, and it continued for eighteen years. During that time Ashland grew from a small village to a city of 15,000 inhabitants. The vast lumber interests that rapidly developed and the increase in population soon gave rise to a large amount of important litigation, and Mr. TOMKINS was connected with many important and interesting cases. He soon took a position as a leader of the bar, and our supreme court reports demonstrate his industry and ability as a lawyer. As a citizen he was public spirited and liberal. He gave freely of his time and money for the development and growth of Ashland. He was by nature a student, and enjoyed nothing better than the working out of deep and involved questions of the law. His greatest strength lay in cases at law, rather than the cases before the jury. He was better at studying out the true conclusions presented by a state of facts than in assembling and presenting facts for the court.

Besides studying law, he was always a student in other directions. After fifty years of age he took up the study of the French language and became quite proficient in it. He was a great student of psychology, and became very much interested in the many interesting questions which that subject presented. During the last few years of his life he took up the subject of the Esperanto language. He was often called on to make a public address. He was not what would be termed an orator, but at the same time he was an interesting and pleasant speaker. He always had something instructive and interesting to say. His style of speaking undoubtedly showed the influence of his father's calling.

His private character and habits were above reproach. He was unusually gentle and simple in manner. He was very democratic in his association with those around him. The suffering of others touched him deeply. No one who went to him for help and advice ever went away without receiving the best he could give. As a lawyer he worked as faithfully on the case of one from whom he expected no remuneration as on the case of his wealthiest client. He gave of his time liberally and unstintedly to the young lawyer who

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William M. Tomkins.

came to him for help. He seemed to enjoy especially the looking up of questions which puzzled young men and in every way tried to help them in their work. There was no affectation in his make up, and he was very tolerant and liberal as to the opinions and views of others. Hate and revenge were unknown to him. As a friend he was constant and true. As a husband and father he was unusually kind and affectionate.

He died of cancer of the stomach. He met his death with remarkable strength and fortitude, spending his last days, up to the last hour, in arranging his affairs and doing what he could for his wife and children. He left surviving him a wife, four sons, and one daughter.

Mr. Michael Barry of Phillips then spoke as follows:

May it please the Court:—On this occasion, when his brethren desire to leave on the records of this court their expressions of esteem and friendship for the late WILLIAM TOMKINS, I crave the privilege to be permitted, as briefly as may be, to add a mite to the testimony already given.

It was my good fortune to meet our late brother in 1879, at a time when both of us were young men and pioneers in the New North. That acquaintance developed into a kindly friendship that continued to the end of his earthly career.

He was not what would be termed a brilliant man, in any way, but rather of that quiet, modest demeanor that readily won friends and kept them. Underneath the unassuming exterior, however, was an indefatigable worker at his chosen profession. He practiced the law as he practiced his religion, with the determination only to be right. His duty to court and the opposing counsel was wholly absorbed in the endeavor to be perfectly fair and just. He enjoyed the distinction, not shared in by many, of gaining the sincere respect and esteem of the lawyer "on the opposite side." He clothed his practice with a dignity that ennobled the profession and invited the emulation of others. Man elevates or degrades whatever he comes in contact with. Mr. TOMKINS's standard was high. He was transparently honest. He was unsparingly just and fair in his practice. He brought to his work that conviction wrought by careful and laborious study of his cases, and was in the forefront of his brethren in professional excellence. He was a fine type of man for the guidance of the younger members of the bar, whom he was ever ready to counsel in their difficulties and perplexities with the law. It was no disparagement to any other aspirant that when our circuit was first formed the members of the bar turned to Mr. TOMKINS as a most fitting candidate to preside over the circuit as its first judge. This was denied him, but it never affected, in the slightest, his standing

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with his brethren. He was a counselor to whom the court could look with absolute confidence in the presentation of his case. Equally could the client rest on his integrity and feel assured that his case would be carefully and skilfully handled. The records of this court disclose the work of a well-trained and competent lawyer.

It cannot be thought for a moment that what we say here, in this presence, adds any weight to the worth of our departed brother; but we know that were places changed with any of us, that kind soul and considerate friend would perform a like service in genuine sympathy and unquestioned sincerity. Mr. TOMKINS lived out his day manfully and truthfully; he was one who made his world here brighter and better for having lived in it; he left in the memory of those who survived, that love and esteem which every true man desires, and which will stay with them as a benediction, not only while life here lasts, but to continue and expand in the better and brighter world beyond. At the great assize when the Judge of all the world will open the books for final determination, we feel sure our departed friend will stand with that unassuming throng on the right hand of Him who doeth all things well, and receive the benediction awaiting a well spent life:

"Come, ye blessed of my Father, inherit the Kingdom prepared for you from the foundation of the world."

On behalf of the court Mr. Chief Justice WINSLOW responded as follows:

Mr. TOMKINS was a lawyer of ability, a man of sterling integrity, and a broad-minded citizen. His career, while not long, was eminently honorable and successful. When I first came to the bench he was one of the most active practitioners from his circuit before this court. He was here at every term with important cases. While his briefs were not elaborate, nor his arguments long, he rarely failed to appreciate and direct his argument to the crucial point or points of his case. Ever courteous and fair to court and to counsel, it was always a pleasure to meet him, and it is not strange that he retained to the last his hold upon his fellow-citizens and his clientage. The example of such a life should not be lost, and the court welcomes the opportunity of making an enduring record of it.

The memorial and address will be spread upon the records of the court and published in the reports.

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CASES DETERMINED

AT THE

January Term, 1909.

JEFFERY and wife, Respondents, vs. CHICAGO & MILWAUKEE ELECTRIC RAILROAD COMPANY, Appellant.

January 6—February 16, 1909.

Railroads: Condemnation of land: Vesting of title: Election to take lesser estate: Mitigation of damages: Tender back of easements, etc.: Crossings: Offer of option on other lands: Evidence of value: Special verdict: Duplication of damages: Existing easement as affecting damages: Instructions to jury.

1. Where land has been condemned for the use of a railroad and the right to the exclusive use thereof has vested in the railroad company under the award, it cannot be surrendered in whole or in part, upon an appeal from the award, without the consent of the landowner.
2. Nor can the defendant railroad company, upon such appeal, elect to take a lesser estate or different interest than that condemned or, for the purpose of mitigating damages or in lieu of damages or value, tender back rights, easements, uses, or conveniences other than the "suitable and convenient farm crossings" provided for in sec. 1810, Stats. (1898).
3. Such crossings as the railroad company may so tender and be allowed to construct and maintain in mitigation of damages must be constructed and maintained upon the lands taken, or upon such lands and other lands of the company, without interference with other land or property of the plaintiff.
4. The fact that other lands in the immediate vicinity could be purchased from a third person at a reasonable price, to which the plaintiff might shift his business, cannot be shown in such a case to reduce the damages to which plaintiff is entitled.
5. An offer to show that the defendant company held an option for the purchase, at a certain price, of adjoining land upon which

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plaintiff might extend his business, and that defendant was ready to assign this option to plaintiff, could have no relevancy except as tending to prove the value of land in that vicinity; and without sworn testimony as to the truth of the statements in the option it was not competent evidence of such value.

6. On appeal from the award in proceedings to condemn land for a railroad the questions submitted to the jury were: (1) What was the fair market value at the date of the award of the strip of land condemned, "considering said strip as a part of plaintiff's entire tract and premises as used in his business?" and (2) In what amount was the fair market value of the remainder of plaintiff's premises depreciated at said date by the taking of the strip condemned? *Held*, that in answering the first question the jury necessarily included some portion at least of the damage to the remainder of the premises, and thus there was inevitably a duplication of the damages in that respect.

7. The admission of evidence as to the value of the land taken "considered as an integral part of the entire plant and property," and "as a part of the entire plant and manufacturing site belonging to the plaintiff, including the machinery and fixtures, considering the plant as an entirety," was erroneous because, in connection with the questions so submitted to the jury, it necessarily led to duplication of damages.

8. The finding of the jury as to the value of the strip taken, viewed in the light of the evidence, is *held* to show that they included therein a portion of the damage to the remainder of the premises and that there was thus a duplication of damages.

9. The fact that a strip across plaintiff's land, partly included in the strip condemned, was subject to an easement entitling certain other persons to use it in common with plaintiff for the passage of cars, should have been submitted to the jury upon the question of damages; and although the requested instruction was not technically correct, yet, the court's attention having been called to it, it was error to omit all instruction on the subject.

MARSHALL, J., is of the opinion that the questions submitted to the jury were strictly proper, especially in connection with the charge of the court, carefully warning the jury against duplication of damages; but is of the opinion, nevertheless, that the damages found are so excessive as to show that the jury did not heed such warning or disregarded the evidence.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

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The appellant, a corporation organized under the general railroad act of the state of Wisconsin and operating its line by electric power, in November, 1905, filed its petition for condemnation, in which it averred that the lands belonged to one of the respondents, *Thomas B. Jeffery,* and prayed that the whole of the lands described in the petition be taken. The lands described consisted of a strip 100 feet wide and 1,013 feet long and was a part of the manufacturing plant and site of the respondent. The court, on the hearing of the petition, determined that all of such real estate was required by the appellant for the purpose of constructing, maintaining, and operating its main line of railway and that the appellant was entitled to take the whole of the real estate described in the petition, and appointed commissioners in accordance with the statute. The commissioners made and filed their award March 3, 1906, wherein they found that the respondent *Thomas B. Jeffery* was the owner of the premises in fee sought to be condemned, and that the value thereof, including the inchoate right of dower of his wife, *Kate E. Jeffery,* was $50,508. Upon making such award the appellant entered into the exclusive possession of the lands condemned and built and constructed a system of railroad tracks for the purpose of operating cars thereon. The petitioner, appellant here, appealed from the award, and upon the trial in the circuit court counsel for appellant made the following offers to the attorney for respondents:

"Thereupon the defendant made the following offer, and at the request of the plaintiffs the jury was excluded:

"The defendant, the *Chicago & Milwaukee Electric Railroad Company,* offers to stipulate and bind itself either:

"(1) To maintain a crossing over its tracks at the point where the crossing now exists, or at such other point as the plaintiff may designate between the works proper of the plaintiff and that track which is known as the 'testing' track, in perpetuity, and to keep it planked and in good condition, and to maintain in perpetuity at this crossing a bell or signal, to be operated by electricity, which will operate automatically

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whenever any car gets within the block, so called, approaching this crossing, the block being about 1,000 feet north and 1,000 south of the crossing.

"(2) The defendant offers to stipulate and bind itself to construct a subway, if permitted by the plaintiffs, under the defendant's tracks leading from such portion of the parcel of plaintiff on the east side of its tracks to such part of his tract on the west side of the defendant's track as may be convenient for and designated by the plaintiff, and to maintain it in perpetuity and keep it drained; such subway to furnish complete and safe means of ingress and egress from the parcel of land now used by the plaintiff as a testing track.

"(3) The defendant also offers to stipulate and bind itself to maintain a conduit, not exceeding twenty-four inches in diameter, under its right of way, from that portion of the plaintiff's works lying to the east of the right of way to the portion of plaintiffs' land on the west thereof; to maintain the same in perpetuity; such conduit being for the use of the plaintiff for laying steam pipes or electric wires or other means of transmitting power or heat or light from one portion of plaintiffs' property to the other.

"(4) The defendant also offers to stipulate and bind itself to give leave to the plaintiffs to build and maintain across defendant's right of way two, or even three, bridges, provided the bridges give a clear height of twenty-three feet from the top of the rails of the defendant's track, the supports to be on the ground of the plaintiffs, and not upon the right of way of the defendant.

"The Court: May I ask, Mr. Quarles, just what purpose you design here that is to serve in this case?

"Mr. Quarles: We propose to ask a special verdict—damages without any stipulations, damages with one or more of them, and then follow the line indicated by the supreme court of Wisconsin, which was that judgment might be entered for the larger amount, and stayed as to a part diminution if found by the jury, until such time as the court might fix for the completion of the offer."

The defendant made the following offers, the jury being excluded:

"Mr. Lines: The defendant offers to bind itself, and hereby offers to grant, by proper conveyance to the plaintiff, the right

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to construct and maintain, under the right of way of the defendant, such subway as the plaintiff may deem sufficient and necessary for the purpose of access to the grounds occupied by his testing track, by machines and by teams and by men, and for any such purpose in connection with the plaintiff's business, the same to be constructed upon such plans and specifications as the plaintiff may desire, providing the same does not interfere with the use of the right of way for railway purposes by the defendant; the same to be constructed and maintained at the plaintiff's expense. And also hereby offers to grant to the plaintiff the right to construct and maintain, at his own expense, under the right of way of the defendant, such conduit or conduits as the plaintiff may desire, for the purpose of transmitting heat, power, light, or water from one portion of plaintiff's premises to the other; the same to be located at such point or points as the plaintiff may elect, and to be constructed upon plans and specifications selected by plaintiff; but in such manner as not to interfere with the use of defendant's right of way for railway purposes.

"Defendant offers to prove, by cross-examination of *Mr. Jeffery,* and such other witnesses as plaintiff may produce upon the question of damages to plaintiff's property, the extent and amount of the damages to that property in case of the acceptance by the plaintiff of any or either of the offers which defendant has made to the plaintiff, and also to prove such damages by witnesses called by the defendant.

"It is thereupon stipulated in open court that this offer of a grant, and also offer of proof, is made and is to be considered as having the same force and effect as though made with a witness upon the stand, subject to the understanding that plaintiffs object to the stipulations and to the offers of proof as incompetent, irrelevant, and immaterial at this time, which objections were sustained by the court. Exception by defendant.

"The defendant further offers to prove that on the 26th day of January, 1906, the defendant served on the plaintiffs a notice that there had been left with Charles A. Tarbell an option, executed by Frances C. Newell and others, owners of a strip of land lying immediately west of plaintiff's property and between it and the Bain private road, so called, as shown on plaintiff's Exhibit E, for the sale of said property at the price of $2,327 at any time within three months from the date of

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said option, to wit, January 8, 1906, said option running to Albert C. Frost, of the city of Chicago, or his heirs and assigns, together with an assignment of said option from said Albert C. Frost to the plaintiff, which notice had attached thereto a copy of said option and assignment, and further notified the said plaintiff that the same would be delivered to *Thomas B. Jeffery* upon his signing a receipt for the same, at any time prior to the first meeting of the commissioners to be appointed to award the compensation in the matter of the condemnation of the strip of land in question.

"Defendant also offered to prove that the defendant deposited the original option, and the assignment thereof mentioned in the notice served upon plaintiff, with Charles A. Tarbell of the city of Kenosha, on or prior to the date of the service of said notice upon plaintiff.

"Which offers were objected to by the plaintiff as incompetent, irrelevant, and immaterial, and were sustained by the court."

The court excluded the offers from the case, to which ruling the appellant duly excepted. Appellant also excepted to various rulings on the admission and exclusion of evidence; to the charge and refusal to charge; also to the refusal to submit the questions proposed by the appellant for a special verdict as follows:

"(1) What was the market value on March 3, 1906, of the strip of land condemned and taken in these proceedings?

"(2) In what amount, if any, was the market value of the real estate of the plaintiff which was not taken diminished by the taking of the strip so condemned, in view of and considering only the uses to which such real estate was put on said 3d day of March, 1906?

"(3) Did the plaintiff, on March 3, 1906, intend to construct in the immediate future any factory building or buildings to the westward of the spur track running from the Chicago & Northwestern Railroad past the west side of his factory buildings?

"(4) If you answer the third question in the affirmative, then what building or buildings did the plaintiff then intend to so build?

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"(5) If you answer the third question in the affirmative, then by what amount, if any, was the market value of the real estate of the plaintiff which was not condemned and taken diminished by reason of interference by the condemnation and taking of said strip of land with the intended uses found by you in answer to the fourth question?"

The court submitted and the jury returned the following special verdict:

"(1) What was the fair market value, on March 3, 1906, of the strip of land condemned and taken for defendant's use, considering said strip as a part of plaintiff's entire tract and premises as used in his business in question? *A.* Twenty-five thousand ($25,000).

"(2) In what amount was the fair market value of the remainder of plaintiff's premises in question not so taken depreciated March 3, 1906, by the taking of the strip so condemned? *A.* One hundred thousand ($100,000)."

Judgment was rendered upon the verdict in favor of the respondents, from which this appeal was taken.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and a supplemental brief signed also by *Miller, Mack & Fairchild,* of counsel and representing the United Surety Company; and oral argument by *T. W. Spence, George Lines,* and *W. C. Quarles.* They contended, *inter alia,* that the court erred in excluding from the consideration of the jury the stipulations and offers made by appellant as to crossings. Sec. 1810, Stats. (1898); *Manitowoc C. P. Co. v. M., G. B. & N. W. R. Co.* 135 Wis. 94, 115 N. W. 390. The court erred in excluding from the consideration of the jury the stipulations and offers made by appellant as to bridges, conduits, and rights over and under the right of way. A railroad is not compelled to assert its full power of condemnation, but may, within reasonable limits, take a less estate than that authorized by law to be taken. *Thompson v. M. & St. P. R. Co.* 27 Wis. 93, 96; *Oregon R. & N. Co. v. Owsley,* 3 Wash. Terr. 38; *McGregor v. Equitable G. Co.* 139

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Pa. St. 230, 237; *Marsh v. Milwaukee L., H. & T. Co.* 134 Wis. 384, 114 N. W. 804; *Jones v. E. & W. V. R. Co.* 169 Pa. St. 333, 32 Atl. 535; *Tyler v. Hudson,* 147 Mass. 609; *Sixth Ave. R. Co. v. Kerr,* 72 N. Y. 330, 26 L. R. A. 751, and cases. The trial of the appeal in circuit court is a trial *de novo. Wooster v. S. R. V. R. Co.* 57 Wis. 311. Amendments to the petition may be permitted upon the appeal as well as before the original award. 2 Lewis, Em. Dom. § 361; *St. Louis, K. & N. W. R. Co. v. Clark,* 121 Mo. 169, 26 L. R. A. 751, and note; *Indiana, I. & I. R. Co. v. Rinehart,* 14 Ind. App. 587, 43 N. E. 238; *Young v. Laconia,* 59 N. H. 534; *Robinson v. Pa. R. Co.* 174 Pa. St. 199, 34 Atl. 546; *Russell v. Turner,* 62 Me. 496; *Murray Hill L. Co. v. Milwaukee L., H. & T. Co.* 126 Wis. 14, 22. Defendant's offers reserving rights and privileges to plaintiff were in effect an amendment to the petition in condemnation by which a less estate than formerly was sought to be condemned. Whether such stipulations be considered in the nature of amendments or otherwise, they seem to have received the express sanction of this court in *Manitowoc C. P. Co. v. M., G. B. & N. W. R. Co.* 135 Wis. 94, 115 N. W. 390. See, also, *Prather v. C. S. R. Co.* 221 Ill. 190, 77 N. E. 430; *State ex rel. Kent L. Co. v. Superior Court,* 46 Wash. 516, 90 Pac. 663; *Indiana, I. & I. R. Co. v. Rinehart,* 14 Ind. App. 587, 43 N. E. 238; *Chicago & G. S. R. Co. v. Jones,* 103 Ind. 386, 390; *Seattle & M. R. Co. v. Roeder,* 30 Wash. 244, 70 Pac. 498, 504.

James Cavanaugh and *Thomas M. Kearney,* for the respondents.

The following opinion was filed February 16, 1909:

KERWIN, J. The commissioners awarded damages for the entire property described in the petition, and the appeal was from the award, neither party appealing from the order determining that it was necessary to take the whole of the land described. The appellant paid into court, in conformity with

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the statute, the amount of the award, and entered into possession of the property taken. The filing of the award and payment of the money vested the title and exclusive use of the premises in the appellant, subject to the amount of the award being increased. *Murray Hill L. Co. v. Milwaukee L., H. & T. Co.* 126 Wis. 14, 104 N. W. 1003, and cases there cited. The condemnation of the land as to the quantity and interest taken became fixed by the order on the hearing of the petition, and the filing of the award, payment of the amount awarded, and taking possession fixed the rights of the parties arising from the taking under the right of eminent domain. The appellant could not, on appeal from the award, elect to take a lesser estate or different interest than that taken below, and which it possessed itself of by compliance with the statute and taking possession. *Sprague v. N. P. R. Co.* 122 Wis. 509, 100 N. W. 842; *Schermeely v. S. & St. P. R. Co.* 16 Minn. 506; *Peoria, P. & J. R. Co. v. Black,* 58 Ill. 33; *Babcock v. C. & N. W. R. Co.* 107 Wis. 280, 83 N. W. 316. The land of the plaintiff having been taken by hostile proceedings in condemnation, he was entitled to compensation for the land actually taken as well as compensation for the damages to the other land, under the statutes giving the remedy. *Bigelow v. West Wis. R. Co.* 27 Wis. 478; *McCord v. Sylvester,* 32 Wis. 451; *Hill v. M. & H. R. Co.* 5 Denio, 206; *C., S. F. & C. R. Co. v. McGrew,* 104 Mo. 282, 15 S. W. 931; *McArthur v. Kelly,* 5 Ohio, 139; *Toledo, A. A. & N. M. R. Co. v. Munson,* 57 Mich. 42, 23 N. W. 455; *Chesapeake & O. R. Co. v. Patton,* 5 W. Va. 234; *Roanoke City v. Berkowitz,* 80 Va. 616; *Hibernia U. R. Co. v. De Camp,* 47 N. J. Law, 518, 4 Atl. 318; *Leeds v. C. & A. R. Co.* 53 N. J. Law, 229, 23 Atl. 168; *Leader v. Multnomah Co.* 23 Oreg. 213, 31 Pac. 481; *In re Eastern Wis. R. & L. Co.* 127 Wis. 641, 107 N. W. 496. The power to take is statutory, and under our constitution and statutes the appellant had the right to acquire the exclusive use of the land in question. It did so, and whether

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it could have taken a less interest, and whether such interest would have been sufficient for the public use described, we need not consider. The court below, upon the hearing for condemnation, determined and adjudged that it was necessary to acquire the exclusive use of the premises described in the petition, and that determination must be held conclusive on appeal from the award. This doctrine is well supported by authority, and rests upon the rule that, after the property has been condemned and the title acquired under the award, it cannot be surrendered, in whole or in part, upon an appeal from the award, without the consent of the landowner. In *Hill v. M. & H. R. Co.* 5 Denio, 209, the court said:

"The object in reserving an easement to the original owners of this land must have been to procure its valuation at a reduced sum and thus save expense to the corporation. All this was very proper to be adjusted by the parties, and might be mutually advantageous to them, but I do not see that the statute authorizes land to be taken compulsorily on any such terms or conditions."

In addition to the cases heretofore cited we call attention to the following: *Charnley v. Shawano W. P. & R. I. Co.* 109 Wis. 563, 85 N. W. 507; *Crook v. First Nat. Bank,* 83 Wis. 31, 52 N. W. 1131; *Clausen v. Head,* 110 Wis. 405, 85 N. W. 1028; *Babcock v. C. & N. W. R. Co.* 107 Wis. 280, 83 N. W. 316.

The main contention of appellant here is that the offers made were not by way of tendering back any of the land or interest therein taken, but for the purpose of mitigating damages. But it seems plain that if the corporation taking could, after it had taken the exclusive use and gotten possession of it under condemnation proceedings, tender back rights, easements, uses, or conveniences in lieu of damages or value, it would be indirectly, if not directly, permitted to evade payment in the manner which the constitution and statutes require. So we arrive at the conclusion that the only crossings which could be considered upon the trial below were

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those contemplated by the statutes, known as "farm crossings." The question, therefore, arises whether the subway offered was a "farm crossing" within the meaning of the statute. It is claimed by appellant, chiefly upon the authority of *Manitowoc C. P. Co. v. M., G. B. & N. W. R. Co.* 135 Wis. 94, 115 N. W. 390, that it was. But the facts in the above case were very different from the facts in the instant case. In view of the physical conditions in the *Manitowoc Case* above mentioned, the subway crossing was the only practical crossing or convenient one which could be given, or at least it was a practical and convenient one and the one calculated to carry out the object of the parties. The track of the railway company was built on an embankment, and the situation of the property and necessities of the Manitowoc Clay Product Company such that any other than a subcrossing would probably not be suitable or convenient. The principal controversy was whether the Manitowoc Clay Product Company was entitled to a farm crossing, and the question was as to amount of damages with and without the crossing. The railway company insisted that the term "farm crossing" as used in the statute was not confined to agricultural land, but applied in all cases where tracts of land were divided by the railroad right of way and it was necessary for the owner to pass from one tract to the other in the proper use and occupation of his property. Some language in the opinion seems to support, in a measure, the claim of the appellant regarding the right of the railway company to tender conveniences irrespective of the statutory crossing, but such was *dicta* not necessary to the decision of the case, and the opinion turned upon the right to a "farm crossing" under the statute, and that the subcrossing was a suitable and convenient one. So we are of the opinion that in the instant case the appellant was entitled to tender a subcrossing, and, if it could show that it would be suitable and convenient, be allowed to construct and maintain it in mitigation of damages, but such

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construction and maintenance must be upon the lands taken, or those taken and other lands of the appellant, and without interference with other land or property of plaintiff. This would seem, from the record before us, difficult, if not impossible, to do, but we do not feel that the appellant should be foreclosed from showing, if it can, that suitable and convenient crossings may be constructed at grade or otherwise. Of course the appellant must show that it is able to construct and maintain such suitable and convenient crossings as are contemplated by the statute; and, as before observed, the crossings need not necessarily be confined to grade, if, otherwise constructed and maintained, they be suitable and convenient; but there is no authority of law for the taking of any property of plaintiff against his will, in the construction and maintenance of any of the rights, easements, or conveniences offered, other than the property taken by the order of condemnation on the original hearing, and which order is not here for review. The offers to construct and maintain a bell or signal, conduit, and bridges were properly ruled out because there is no authority for such construction against the will of the plaintiff. What has been heretofore said is sufficient upon this point.

Counsel for appellant favors us with some authorities which appear to hold a different doctrine, and at least lean to the idea that rights and privileges may be tendered by the corporation taking in mitigation of damages. But in so far as those cases are out of harmony with the rule laid down in this opinion we cannot follow them. We think the policy of this court thus far has been to hold to the contrary, as shown by the cases heretofore cited, namely, that after the land of the owner is condemned the compensation must be made for the damages, and only in the way pointed out by the statutes. In *Sprague v. N. P. R. Co.* 122 Wis. 509, 100 N. W. 842, this court held that after the award the railway company could not discontinue because under the award title vested in the

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company. If the company cannot dismiss as to the whole of the land taken because of the vesting of title, why as to part? The transferring to the owner of rights, easements, and privileges out of the land taken in effect is turning back part of the property taken in mitigation of damages. In *Sprague v. N. P. R. Co., supra,* Mr. Justice SIEBECKER, speaking for the court, said:

"It is the policy of the state, as evidenced by the statute, to give railroad corporations extensive powers for acquiring real estate for corporate uses, but such powers should be exercised in good faith, on occasions when the interests of the public and of the corporations are to be promoted by it. It is upon these considerations that the right is granted to these corporations of taking all necessary real estate at its fair market value, regardless of the wishes of the owner, who must yield to the necessities of the public undertaking. If the right is asserted and established by the condemnation, and prosecuted to the point of ascertaining the amount of the award, and the railroad company is permitted to elect to abandon the proceeding or not after such award, upon the ground that it cannot secure the property at its own price, it might readily transpire that the owners would be subjected to many hardships, and their rights might be seriously interfered with. We must hold that the proceeding cannot be dismissed after the commissioners' report has been filed with the clerk of the circuit court."

Other authorities supporting the conclusion arrived at are 15 Cyc. 783; *Petition of N. Y., L. & W. R. Co.* 49 Hun, 539, 2 N. Y. Supp. 478; *Old Colony R. Co. v. Miller,* 125 Mass. 1; 2 Lewis, Em. Dom. (2d ed.) § 505; *Roanoke City v. Berkowitz,* 80 Va. 616; *Oregon S. L. R. Co. v. Fox,* 28 Utah, 311, 78 Pac. 800; *Van Horne's Lessee v. Dorrance,* 2 Dall. 304.

It is claimed that the court erred in refusing to receive an option held by appellant for the purchase of a tract of land west of the plaintiff's plant for $2,327 from the Bain estate. The condemned strip having taken a part off the side of the

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plaintiff's tract, leaving him with an imperfect testing track and no land of his own suitable for extension, it was proposed by the tender of the option to show that a sufficient quantity of land was embraced within the option at the amount named. The obvious purpose of this offer was in mitigation of damages. The fact that other lands in the immediate vicinity could be purchased from a third party at a reasonable price, to which plaintiff should shift his business, could not be shown to reduce the damages to which plaintiff was entitled. It is not material that he could move part of his plant to other land for the purpose of giving the appellant a right of way, and thus, in effect, swap land for the accommodation of appellant. What has been heretofore said applies here as to the tender in mitigation of damages, which it was obviously offered for. The only relevancy such an offer could have, if admissible for any purpose, would be as tending to prove the value of land in the immediate vicinity of the plaintiff's plant on the question of value of the land taken and damages to other land. But the offer was not competent on the question of value of the land embraced in the option. The option offered was not supported by any sworn testimony, and therefore the statements therein were not evidence of value of the land described therein. 2 Lewis, Em. Dom. (2d ed.) §§ 446–448; *Watson v. M. & M. R. Co.* 57 Wis. 332, 15 N. W. 468; *Seefeld v. C., M. & St. P. R. Co.* 67 Wis. 96, 29 N. W. 904; *Esch v. C., M. & St. P. R. Co.* 72 Wis. 229, 39 N. W. 129; *Montclair R. Co. v. Benson,* 36 N. J. Law, 557; *Winnisimmet Co. v. Grueby,* 111 Mass. 543. Moreover, the contents of the option were not made known, except by a general statement. The option was not offered formally, so that counsel could examine it, so far as we can discover from the record. Nor does it appear that the option was in force when the offer was made. It is very obvious that it would be a dangerous rule to allow an adverse party, for the purpose of establishing the value of land, to

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put in evidence a writing purporting to be an option to sell at a named price, without any other proof verifying the facts stated in the option. This would, in effect, be to allow the appellant to make proof by declarations of third parties not under oath. The offer made to assign the option to the plaintiff had no materiality, because, as we have seen, appellant could not transfer interest or rights in lands in mitigation of damages, and it was not competent on the question of value of the land therein described or in the vicinity. *Seefeld v. C., M. & St. P. R. Co.* 67 Wis. 96, 29 N. W. 904; *Montclair R. Co. v. Benson,* 36 N. J. Law, 557; *Esch v. C., M. & St. P. R. Co.* 72 Wis. 229, 39 N. W. 129.

There is another class of errors which may, we think, be conveniently treated together, because they go to the question of amount of damages and whether excessive. As will be seen from the statement of facts, the appellant requested that certain questions be submitted in the special verdict, which were refused, and the court submitted as the verdict two questions. It is difficult to see how the jury could have answered these questions as they did without duplicating the damages. Had the court submitted the questions asked by the appellant the verdict would not be open to objection of duplicity. The first question proposed simply asked for an answer as to market value of the land taken March 3, 1906, and the second as to how much the market value of the remaining land of plaintiff was diminished by the taking of the strip, considering the uses to which such land was put on March 3, 1906. It is plain that any answer to these questions could not result in duplicating damages. But how about the questions submitted? In the first the jury were asked to find the fair market value on March 3, 1906, "considering said strip as a part of plaintiff's entire tract and premises as used in his business in question." And in the second question they were asked to find the fair market value of the remainder of the plaintiff's premises not so taken de-

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preciated March 3, 1906, by the taking of the strip so condemned. Now the plaintiff was entitled to recover the fair market value of the strip taken and the damages to the other land occasioned by the taking; but when they found in the first question the value of the strip taken, considering it as a part of the plaintiff's entire tract and premises as used in his business, they necessarily found, not only the value of the strip taken, but some damage to the remaining premises. The value of the strip, considering its use in connection with the balance of the land as used in the plaintiff's business, necessarily involved the idea of damage to the remainder of the plant. The jury by the first question of the special verdict was required to find, not alone the value of the strip taken, but its value as part of the plaintiff's entire tract and premises as used in his business. This was quite a different thing than finding the value of the strip as a part of the whole tract of land of which it was a part, considering its natural advantages arising out of its location and situation. Its value as a part of the entire premises as used in the plaintiff's business must include deterioration in whole or in part of the remainder of the plant, because this is its value when considered as a part of the entire premises as such premises were being used when the strip was severed. The value of the strip as used in the plaintiff's business would necessarily be regarded by the jury as including a part of the damage which the whole plant would sustain by the severance of the strip. A strip of land taken out of a manufacturing plant might be of great value when considered as a part of the premises as used in the business, while aside from its use in the business it might be of very small value. So the idea of value of the strip for such use included an element of damage to the premises and business. Suppose the plaintiff was forced to purchase a small strip of land adjacent to his plant and necessary to have in order to successfully operate his plant. The value of such strip to him for use in connection with his business

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would far exceed the market value or the value to others, and by the addition of the strip his plant would be increased in value far beyond the reasonable market value of the strip. So in the first question, when the value of the utility of the strip in connection with the plaintiff's business was included in the damages, some portion of the damage to the whole premises was included. We think the jury, in answering the first question intelligently, would necessarily include damage to the remainder of the premises. Had the second question of the special verdict been framed so as to exclude any damage above the value of the land taken, the situation would be different. But it was not. On the contrary, the second question called upon the jury to award all damages for depreciation caused by the taking of the strip. In this situation duplication of damages seems inevitable. If the verdict had confined the jury to finding the market value of the strip taken as a part of the tract, and not as part of the tract "considering said strip as part of the plaintiff's entire tract and premises as used in his business," it perhaps would not have been subject to criticism under the rule laid down in *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 375, 18 N. W. 328; *Watson v. M. & M. R. Co.* 57 Wis. 332, 15 N. W. 468; *Esch v. C., M. & St. P. R. Co.* 72 Wis. 229, 39 N. W. 129, and other cases in this court.

Moreover, in connection with the form of the verdict, certain evidence admitted under objection was well calculated to unduly enhance damages. Witnesses were permitted, against appellant's objection, to answer questions respecting the value of the land taken, "considered as an integral part of the entire plant and property," and the value of the strip taken "as a part of the entire plant and manufacturing site belonging to the plaintiff, including the machinery and fixtures, considering the plant as an entirety, and including fixed machinery and fixtures." These, and other similar questions permitted to be answered as to the value of the strip

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taken and damages to the remaining land, in connection with the special verdict, made a case which necessarily resulted in duplication of damages, and was not cured by the charge.

The findings of the jury also clearly show, when viewed in the light of the evidence, that it did in fact include in the value of the strip taken damages to the other land. The quantity of land taken was about 2.3 acres, and the witnesses under the form of questions asked put the value at from $35,000 to $60,000, the jury finding the value of the strip taken under the first question of the special verdict, $25,000; yet the evidence establishes that the strip taken, disconnected from the balance of the plant and business, would not exceed one tenth of the award allowed by the jury for it. The strip taken was not occupied by any buildings, except a foundation constructed shortly before the petition for condemnation was filed. It was situated between the main plant and the testing track, and took a small portion of the testing track. So it is plain that the jury, in awarding damages for the strip taken, included in such award a portion of the damages included in the award of damages to the remainder of the land and premises, and yet under the second question they were required to award all damages done the remaining premises.

At the time the condemnation proceedings were commenced there was an easement for railway purposes between the plaintiff's testing track and the balance of the land, and a part of the strip taken lapped over upon this easement or right of way, which is known in this case as the Newell-Hoyt easement, and this easement separated the main part of the plaintiff's plant from the testing track and therefore was an important consideration on the question of damages to the balance of the plant not taken. Upon this point the appellant requested the court to instruct the jury as follows:

"You are instructed that on the 3d day of March, 1906, a right of way, or easement, as it is called, belonged to Mrs. Newell and Mrs. Hoyt, to build and maintain a track, or

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tracks, across the premises of plaintiff upon a strip of land twenty feet wide, the center of which strip was 341.9 feet west of the west line of Charles street, and which ran north and south through said premises in a straight line after leaving the end of the curve in the spur tracks shown on the map, marked 'Plaintiff's Exhibit E,' and to cause to be transported property in cars along such tracks. The right of the owners of this easement so to occupy and use said strip was paramount to any right of the plaintiff to cross such strip or to use the surface thereof for any purpose whatever."

This instruction was calculated to bring to the attention of the jury the fact that along the condemned strip there existed an easement which necessitated the keeping of this strip open and unobstructed for the passage of cars. The fact that this easement existed should have been submitted to the jury upon the question of damages. The court not only refused to give the instruction requested respecting the Newell-Hoyt easement, but sent the case to the jury upon the theory, so far as we can discover from the record, that no such easement existed. This we think was error. Whether the strip taken by appellant cut the plaintiff's land so as to separate the main part from the testing track, or whether an easement existed at the time condemnation proceedings were commenced which would in whole or in part have the same effect, was a most important consideration for the jury. The easement secured the right to Mrs. Newell and Mrs. Hoyt as well as to plaintiff to use this strip of land for the passage of cars. The request to charge to the effect that they had a paramount right to this strip was not technically correct, because the proof shows that the use by them was in common with the plaintiff, there being mutual covenants in the deeds between the parties for use by each. But some instruction along the line asked should have been given. The importance of some instruction on the subject is intensified by the proof admitted. For example, evidence was admitted, over objection and exception, of the value per square foot of the plant, and the idea of ex-

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tension of the business made to appear to be a prominent factor in the value of the plant and property taken, as well as damages; also as to the value of the strip taken "considered as an integral part of the entire plant and property," and "considered as a part of the entire plant and premises occupied by *Jeffery*, including fixed machinery and fixtures." This and other evidence was admitted, which, when taken in connection with the verdict, was well calculated to tie the jury down to a wrong rule of damages. No error was committed in refusing to charge that the plaintiff's plant consisted of two tracts, but the jury should have been instructed as to the existing easement extending through it, over a part of which the strip condemned lapped, to the end that the jury might have full knowledge of the obstructions in the way of extending buildings over this strip, regardless of the appellant's right of way. *Tobey v. Taunton*, 119 Mass. 404; *Miller v. Newark*, 35 N. J. Law, 460.

Since there must be a new trial we have referred only in a general way to many of the alleged errors in so far as may be helpful to the court below on another trial, without intending to cover in detail all points raised in the record.

It is also claimed that the damages are excessive. The duplication of damages arising from the manner in which the case was presented to the jury, including the form of the verdict, doubtless accounts for the size of the verdict. Whether we would set the verdict aside as excessive if the case had been properly presented and no error appearing in the record we need not determine, since the judgment must be reversed upon other and more obvious grounds.

By the Court.—The judgment of the circuit court is reversed, and the action remanded for a new trial.

The following opinion was filed March 3, 1909:

MARSHALL, J. (*concurring*). In my opinion the final result of the appeal is right, but the ground upon which it is

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decided that the damages assessed are excessive is out of harmony with the statute, with the practice under it, and with the decisions of this court.

Sec. 1848, Stats. (1898), provides that in a case of this kind the commissioners shall appraise . . .

(1) the value of each . . . parcel of land proposed to be taken with the improvements thereon, and

(2) the damages sustained by the owner by reason of the taking thereof, and that they shall

(3) not make any allowance or deduction on account of any real or supposed benefits to the proprietor from the construction of the road, but

(4) special benefits to real estate "adjoining that taken" shall be allowed in deduction of any damages . . . to such adjoining real estate.

The value of land taken is required to be fixed with reference to the market value for any purpose to which it may be adapted so far as appears presently to affect such value. *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 373, 18 N. W. 328. That includes adaptability to be platted into lots to be sold for building purposes, the use to which it is intended to be applied, and every use for which it is adaptable, present or future, enhancing the present value. *Watson v. M. & M. R. Co.* 57 Wis. 332, 356, 15 N. W. 468; *Meinzer v. Racine,* 74 Wis. 166, 169, 42 N. W. 230.

The amount to which the landowner is entitled on account of the land taken is its fair market value for any purpose for which it may reasonably be used presently or in time so near as to appreciably affect such value. *Watson v. M. & M. R. Co., supra,* p. 356, 15 N. W. 479.

In the whole, the landowner is entitled to be made as good, by payment of money, as if his property were not disturbed by the railroad enterprise, not considering benefits or damages caused by the building of the road disassociated from physical disturbance of the property, except by offsetting special benefits to land not taken against damage to such land.

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He is entitled to "the difference between the fair market value of the whole property before the taking and the fair market value of what" remains "after the taking." *Watson v. M. & M. R. Co., supra,* p. 354, 15 N. W. 478.

As regards the value of the land taken in a case of this kind, such value is "the market value of the strip taken, at the time it was taken, as a part and parcel of the lot of which it formed a part." The jury were so instructed in *Esch v. C., M. & St. P. R. Co.* 72 Wis. 229, 39 N. W. 129, and the charge was in all respects approved. The court said:

"When the jury, in obedience to the instructions given, assessed the value of the strip taken as a part of the whole lot, and as a parcel of the same, and determined the damage suffered by the plaintiff by reason of the taking to the balance of the lot not taken, these two amounts, added, would give the plaintiff's compensation precisely as the rule was laid down by the trial court in the *Watson Case* [57 Wis. 357, 15 N. W. 468], which was approved by this court."

The court submitted to the jury two questions: First. "What was the market value of the strip taken at the time of the taking . . . considered as a part and parcel of the lot of which it was a part?" Second. "What was the damage to the market value of the residue of the lot" at the time of the taking?

In *Barker v. M. & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328, decided with *Washburn v. M. & L. W. R. Co., supra,* the trial court refused to admit evidence of the value of the strip taken as a part of the whole lot, holding that the value of the strip was to be ascertained without reference to the balance of the lot, the same as though some other person owned it. For that reason the landowner prevailed on the appeal. 59 Wis. 375, 18 N. W. 333. In disposing of the matter the court said:

"It was argued that unless the rule of the circuit court be adopted, the enhanced value of the part taken, if considered as a part of the lot, may be assessed as damages for depre-

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ciation in the value of the portion of the lot not taken. The danger of a double assessment can, we think, be readily averted by a proper instruction in that behalf. It is a substantial right of the plaintiff to recover directly the full value of the land taken, because there can be no diminution therefrom on account of benefits. Whereas, if such value is included in the assessment for the depreciation of the value of the balance of the lot resulting from such taking, the whole amount thereof is liable to be absorbed by an assessment for benefits."

So it will be seen that in the *Watson Case* and the *Esch Case* the court approved submission to the jury of the case to find, first, what was the market value of the strip of land taken, at the time it was taken, as a part and parcel of the whole lot of which it was a part; second, what was the damage to the market value of the residue of the lot, in consequence of such strip being taken; and in the *Washburn Case,* because the court refused to submit the first feature in the form indicated the result was reversed. Now let us see how the decision here stands with reference to that situation.

The court submitted to the jury to find, first, What was the fair market value on March 3, 1906, of the strip of land condemned and taken for defendant's use, considering said strip as a part of plaintiff's entire tract and premises as used in his business in question?

That for short is this: What was the fair market value on March 3, 1906, of the strip of land taken considered as a part of the whole tract of which it formed a part? Now it seems no one could read that question and the decisions to which I have referred, without seeing clearly that the learned trial judge either had the decisions before him when the question was drafted or had that clearly in mind. The form follows what was there approved as necessary with strict accuracy.

The next question is this: "In what amount was the fair market value of the remainder of plaintiff's premises in

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question, not so taken, depreciated March 3, 1906, by the taking of the strip so condemned?"

What we have said as to the first question may be regarded as repeated as to the second. Court and counsel evidently relied, as well they might, on decisions of this court setting the matter at rest a quarter of a century ago, which has never since been cast into doubt in the slightest particular.

This court now says, "It is difficult to see how the jury could have answered these questions as they did without duplicating damages." Is that not just the opposite from what this court said, speaking by LYON, J., in the *Washburn Case* we have quoted from? Again the court says, "Had the court submitted the questions asked by appellant the verdict would not be open to objection of duplicity." Turning to the questions referred to, I find the first to be: "What was the market value on March 3, 1906, of the strip of land condemned and taken in these proceedings?" omitting: considered as a part of the whole lot from which it was taken; the very defect which worked a reversal in the *Washburn Case* and was said to be out of harmony with the previous case (*Watson v. M. & M. R. Co.* 57 Wis. 332), as it evidently is with the subsequent case of *Esch v. C., M. & St. P. R. Co.* 72 Wis. 229. The second question as the court approvingly states it is this: "In what amount, if any, was the market value of the real estate of the plaintiff which was not taken diminished by the taking of the strip so condemned in view of and considering only the uses to which such real estate was put on said 3d day of March, 1906?" Thus confining the value to the particular use characterizing the land at the time of the taking, excluding future uses that might enhance the value, directly contrary to all the cases we have cited and the universal current of authority in this and other courts; excluding elements essential, as this court has said, to afford the landowner that full and just compensation to which he is entitled under the constitution.

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Thus the verdict which appellant unsuccessfully requested, as to both questions, and which the court approves as the form necessary to prevent duplicity, has been, heretofore, as unquestionably condemned, as has the verdict actually submitted now condemned been, heretofore, unquestionably approved. I cannot see the situation different than this, and regard it as most unfortunate. I trust I have not exaggerated it. I have endeavored to make it as plain as possible to the end that I may not share the responsibility of the error, if there be one, and that I may do what I can to secure a return to what I deem to be the correct rule.

I note that this court, very guardedly, suggests that if the first question submitted had omitted the words "as used in his business in question," perhaps it would not have been subject to criticism under the rule laid down in the cases to which I have referred, thus, seemingly, not intending to invade such rule, but suggests that a question drafted in exact accord with it might not be subject to criticism, and at the same time proclaims that a question submitted and rejected, omitting the element expressly required by such rule, should have been submitted. The words "as used in his business" were in exact conformity to the rule that the present use of the strip in common with the whole of which it forms a part as well as any use, prospective, affecting the value, are proper elements of value.

True, as suggested by Justice LYON in the *Washburn Case,* there is danger of a duplication of damage in such a case, but as the court said, "The danger . . . can be readily avoided by proper instructions in that behalf."

It was there held that questions of the full scope submitted here, were essential to protection of constitutional rights and that the danger of one overlapping the other was to be obviated by instructions.

The learned trial court had this court's suggestion last referred to clearly in mind. The jury were carefully in-

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structed as to the "fair market value." They were instructed that the value of the strip was to be determined with reference to the value of the whole of which it formed a part. They were told:

"In determining the value of the strip taken you will be careful not to confound such value with any damages, if any, to the remainder of the premises occasioned by such taking; and in determining the damages, if any, to the remainder of the premises not taken you must not include any valuation fixed by you of the strip taken. The two elements of damage are separate and distinct from each other."

What more could one ask? An examination of the briefs and cases heretofore submitted in cases, fails to disclose an instance where danger of duplication of damages was more carefully guarded against by the verdict and the charge than in this case. I think the submission in that regard was faultless.

Notwithstanding the distinguished correctness of the submission, I am satisfied from the size of the verdict and the evidence that the jury either failed to profit by the court's careful admonishment as to duplication of damages, or plainly disregarded the evidence. The evidence of the witnesses upon which the jury grounded its finding, plainly duplicated the damage. The opposing evidence did not. That is the explanation of the difference being so great as not to be attributable to mere difference in judgment applied from a common standpoint. I will not take time to go into the evidence. It is sufficient to thus state my conclusion.

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STATE EX REL. LEISER, Executor, Respondent, vs. KOCH, Appellant.

January 8—February 16, 1909.

Municipal ordinances: Judicial notice: Pleading: Conclusion of law: Demurrer: **Mandamus:** ***Building inspector: Compelling issuance of permit: Sufficiency of return.***

1. Courts do not take judicial notice of municipal ordinances not pleaded.
2. The petition for a writ of *mandamus* to compel a building inspector to issue a permit pursuant to city ordinances should show the existence of an ordinance imposing such duty and that the duty is absolute or the action under the ordinance merely ministerial.
3. An allegation in such petition that it is the duty of said inspector, under the ordinances of the city, to issue such permit, does not sufficiently plead the ordinances. It is not an averment of fact, but a mere conclusion of law not admitted by demurrer. MARSHALL, J., dissents.
4. A demurrer to the return to an alternative writ of *mandamus* relates back to the petition and raises the question of its sufficiency.
5. The return of a building inspector to an alternative writ of *mandamus* commanding him to issue a permit for certain repairs or alterations in the basement of a building, that "the superstructure is so dilapidated, rotten, and in bad condition that it will be unwise and unsafe to permit the repair of said building in such manner," is a good return if the ordinances governing his action permit of any discretion on the part of the inspector in refusing permits.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The judgment appealed from awarded to the relator a peremptory writ of *mandamus* commanding the building inspector of Milwaukee to issue a permit for the alteration of a certain building in said city. It followed an order sustaining a demurrer to the return to the alternative writ.

For the appellant there were briefs by *John T. Kelly,* city

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attorney, and *Benjamin Poss,* special assistant city attorney, and oral argument by *Mr. Poss.* They cited, among other authorities, Laws of 1887 (vol. II), ch. 459; *Milwaukee I. Co. v. Schubel,* 29 Wis. 444; *State ex rel. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777; *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672, 70 N. W. 300; *State ex rel. Gericke v. Mayor, etc.* 99 Wis. 322, 74 N. W. 783; *State ex rel. Schermerhorn v. McCann,* 107 Wis. 348, 83 N. W. 647; 26 Cyc. 290.

For the respondent the cause was submitted on the brief of *P. G. Lewis.* He cited *People v. Board of Health,* 140 N. Y. 1; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347.

Timlin, J. The petition or relation upon which the alternative writ of *mandamus,* seeking to enforce the issue of a permit for repair of a certain building, was issued contained no statement that there was enacted, or that there existed, an ordinance of the city imposing a duty upon the building inspector to issue such permit. Much less does it disclose that such duty was absolute or the action thereunder ministerial. The averment is as follows:

"Your petitioner further alleges and shows to the court that on the 10th day of July, A. D. 1907, pursuant to the ordinances of the city of Milwaukee, he made application to *Edward V. Koch,* Esq., as inspector of buildings of said city of Milwaukee, for a building permit for the erection of a brick basement under said building, and in all things complied with the ordinances of said city, and did on the 10th day of July, A. D. 1907, make due application for a permit, hereto annexed, to build said basement under said building, and did tender to and offer to file with the inspector of buildings of said city plans and specifications, hereto annexed, for the erection of said basement, and did at the same time duly tender to said inspector of buildings the legal fee therefor, as required by law; that the inspector of buildings of said city did refuse and still does refuse to grant your petitioner, as

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executor of said estate, a permit to build said basement; that it is the duty of said inspector, under the law and ordinances of said city of Milwaukee, to issue such permit."

No general statute imposes upon the inspector any such duty. There was no ordinance pleaded showing any such duty, giving the relation the most liberal construction. *Decker v. McSorley,* 111 Wis. 91, 86 N. W. 554; McQuillan, Mun. Ordinances, § 374; *Buckley v. Eisendrath,* 58 Ill. App. 364. The concluding statement above quoted is a mere conclusion of law not admitted by demurrer, and not an averment of fact. It might be sufficient, in the absence of a motion to make more definite and certain, to admit proof of the ordinance. But that is not in the case here. No ordinance is offered in evidence. We are obliged to accept this statement as the ordinance or else reject it as a conclusion of the pleader. *McCune v. Norwich City G. Co.* 30 Conn. 521; *Buffalo v. Holloway,* 7 N. Y. 493; *Angus v. Lee,* 40 Ill. App. 304; *Morton v. Comp. Gen.* 4 S. C. 430. The court does not take judicial notice of municipal ordinances not pleaded. *Davey v. Janesville,* 111 Wis. 628, 87 N. W. 813; *Pettit v. May,* 34 Wis. 666; *Horn v. C. & N. W. R. Co.* 38 Wis. 463; *Stittgen v. Rundle,* 99 Wis. 78, 74 N. W. 536.

The alternative writ, which is the first process, but not the first pleading, in *mandamus* recited: "Whereas under the ordinances of the city of Milwaukee it was the duty of said *Edward V. Koch,* as such inspector of buildings, to issue unto the petitioner a permit," etc.; but even here there is no ordinance referred to, either by its number or date of passage or publication, nor does it purport to give either the words or the substance of the ordinance, and it has only the petition to rest upon, where the averment is still more defective. The building inspector made return to the alternative writ. The relator demurred to this return. This demurrer to the return was sustained, and thereupon, without further trial, judgment was entered awarding the peremptory writ. The trial

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court should have carried the demurrer back to the first defective pleading; in this case the relation for the writ. This precise point is covered by *State ex rel. Burns v. Elba,* 34 Wis. 169, and *State ex rel. Cuppel v. Milwaukee Cham. of Comm.* 47 Wis. 670, 3 N. W. 760. This is not a technical, but a substantial and necessary, rule of law, because without it we would have the anomaly of rendering judgment for a plaintiff who had no cause of action—that is, no legal right violated—merely because the defendant's answer was defective. This rule does not apply to defects in the complaint which may be waived by answering.

But if the relation was defective the return was grotesque. It first set forth that the duties of the building inspector and the laws relating to the erection and construction of buildings are covered by ch. 3 of the general ordinances of the city. It nowhere gives information of the contents of ch. 3, but selects two sections (7 and 10) of that chapter and sets them forth *in extenso* twice, once in the body of the return and again in the order of the building inspector attached to the return as an exhibit. Sec. 7 provides for two cases, one where the building, wall, or part of a building, platform, or staging is dangerous or unsafe for the purpose for which it is being used or in danger of being set on fire because of defects in construction; and in these cases the inspector is required, or authorized, to notify the owner, or his agent, in writing, specifying wherein the danger consists or wherein such building is unsafe and defective. If the owner, or his agent, after such notice neglects to proceed to put the building in a safe condition or forthwith to pull down or secure such building, etc., he shall be deemed guilty of a misdemeanor. The object of pleading this part of the ordinance is not apparent, unless it be to show that the building inspector did not comply with it, for it is afterward shown that, instead of acting as therein directed, he acted jointly with the health inspector, and instead of giving the notice there required they made an order

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"that said building be torn down and removed within sixty (60) days after service upon you of this notice." The other paragraph of this sec. 7 pleaded authorizes the inspector of buildings and the chief of the fire department to determine upon evidence that there is actual and immediate danger of the falling of a building or some part thereof so as to endanger life, and in that case the building is to be deemed a nuisance and the inspector shall cause such work to be done as may be necessary to render said building or part thereof safe, or may cause said building, or such part thereof as may be unsafe, to be torn down or removed. The purpose of pleading this section is not obvious, because it is by its terms limited to cases of actual and immediate danger and is to be carried out by determination upon evidence of the building inspector and the chief of the fire department, while in the instant case there is no averment or finding of actual and immediate danger to justify the order to tear down, and the building inspector seems to have disregarded its provisions by proceeding without the chief of the fire department and acting with the unauthorized health commissioner.

The sec. 10 pleaded relates to appeals from the decision of the inspector of buildings to a board of arbitration, but does not include appeals from the emergency orders of the inspector and chief, and seems to be also wholly irrelevant. But the capsheaf of this irrelevant return is found in the order of the arbitrators on appeal, which is also returned, as follows:

"We find that the buildings in question . . . are in a very dilapidated condition, which as to the two buildings known as No. 601 and No. 603 is due mainly to their age, and the present value of the foundations of the aforementioned two buildings was not taken into consideration because of their thoroughly dilapidated condition. The upper structures, after a very careful and thorough examination as to their value, were found to be damaged to a greater extent than fifty per cent. of their original cost. We therefore find that the building inspector's and health department's orders must

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be sustained in condemning said two buildings (No. 601 and 603 Cherry street), but we have decided that the frame building known as No. 605 Cherry street may remain."

However, among the judicial farrago in the return we find the following separable averment:

"That in the opinion of the inspector of buildings the placing of a brick basement under said house at 601 Cherry street, as proposed in the application for permit to make alterations, would not make safe said building, for the reasons hereinbefore set forth, namely, that the superstructure is so dilapidated, rotten, and in bad condition that it will be unwise and unsafe to permit the repair of said building in such manner."

This is a good return if the ordinances permit of any discretion on the part of the inspector in refusing permits. But we do not determine that point, having no assurance that we have before us the ordinances bearing on that subject. As it is, the judgment must be reversed, with orders to sustain the demurrer as a demurrer to the relation.

By the Court.—The judgment is reversed, and the cause remanded with directions to sustain the demurrer to the relation.

The following opinion was filed March 2, 1909:

MARSHALL, J. (*dissenting*). I have to dissent in this case. It is conceded by my brethren that if there is an ordinance in the city of Milwaukee making it mandatory upon the building inspector, in case of an application being presented to him for a building permit, such as was presented in this case, to issue such permit, then there was a failure on the part of such inspector to perform a plain ministerial duty giving cause for *mandamus* proceedings, such as were resorted to in order to compel performance, and if the existence of such ordinance was sufficiently pleaded, as against a demurrer for insufficiency, the writ of *mandamus* was properly

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awarded, since the demurrer to the return, in that case, was properly sustained, such return being, as my brethren choose to characterize it, as an apt way of describing its utter insufficiency, "grotesque." I do not need to add anything to what is said in the court's opinion as to the irrelevancy of the return to the extent of glaring absurdity.

The rule that an issue of law joined by a demurrer to a return or an answer presents not only the question of law as to the sufficiency of the second pleading, but also as to the sufficiency of the first one, is elementary; as is also the rule that such principle is substantial. But I do not understand, or else do not agree with, the reasoning upon which the conclusion is grounded, that the relation in this case is not good on a challenge for insufficiency. It states, in plain language, that the petitioner presented to the building inspector an application for a building permit and complied in all respects with the ordinance of the city as regards conditions precedent to his right to such permit; that the permit was refused, and that it is the duty of said inspector, under the law and ordinances of said city of Milwaukee, to issue it.

My brethren concede that the allegations might be sufficient, in the absence of a motion to make more definite and certain, to admit proof of the ordinance. But they say, "that is not the case here." Why "is not that the case here?" My brethren give no reason except that the demurrer to the return should be regarded as involving a counter denial of the sufficiency of the relation. Then we have this logic: A complaint, in general terms, reasonably suggesting facts not specifically set forth; a pleading of the facts by the legal results, in a sense conclusions of law, is good upon a challenge by the defendant by demurrer for insufficiency, even though open to a motion to make more definite and certain. But if defendant sees fit to omit such motion and answers, and the plaintiff demurs thereto, whereas, before, the pleading was proof against a formal demurrer by the defendant, it is not

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as to the demurrer thereto which the law now interposes under the principle before stated. Whereas, before, by the letter and the broad liberal spirit of the Code, so often vindicated, especially in recent years, and so beneficial, as we have had many occasions to say in the administrations of justice, whereby the pleading was good if sufficient facts appeared expressly alleged or by reasonable inference, giving full effect to the facts pleaded according to their legal effect, where the ultimate circumstance might reasonably be viewed as a fact, though viewable as a conclusion of law from facts, as well (*Morse v. Gilman,* 16 Wis. 504; *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 427, 84 N. W. 159; *South Milwaukee Co. v. Murphy,* 112 Wis. 614, 625, 88 N. W. 583; *Andresen v. Upham Mfg. Co.* 120 Wis. 561, 564, 98 N. W. 518; *Prentice v. Nelson,* 134 Wis. 456, 114 N. W. 830), now it must be viewed by the pre-Code practice, requiring it to stand the test of every reasonable intendment and presumption against it (*Morse v. Gilman, supra; Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921), involving the idea that, in the new situation, a demurrer to the second pleading may serve the purposes of both a statutory demurrer and a motion to make more definite and certain. I must say I do not understand the established practice to justify that doctrine.

True, as the relation stands, we are obliged to accept the statement as to the ordinance or else reject it as a conclusion of the pleader, but that is always true in case of testing facts pleaded by reasonable inference, especially when the allegation permissibly takes the form of pleading facts by their legal effect. That is held in the numerous cases in this court where such condition has been held not to militate against the sufficiency of the pleading when challenged upon demurrer.

I fail to see how decisions of other states having the common-law system, or ancient cases under a Code like ours, but with an undeveloped practice under it, or cases in our court as to the admissibility of an ordinance in evidence where not

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mentioned in the complaint at all (*Stittgen v. Rundle*. 99 Wis. 78, 74 N. W. 536, and *Horn v. C. & N. W. R. Co.* 38 Wis. 463), or as to the admission in evidence of a copy of an ordinance, not properly certified under the statute to make it receivable (*Pettit v. May,* 34 Wis. 666), or as to taking judicial notice of an ordinance which, under the general system for amending city charters by municipalities, has the characteristics of general public laws (*Davey v. Janesville,* 111 Wis. 628, 87 N. W. 813), have any bearing on the question here.

The extent to which this court has gone in simplification of the practice under the Code, avoiding all nonessentials, is very strikingly illustrated in *Prentice v. Nelson,* 134 Wis. 456, 114 N. W. 830, where, in a suit on a treasurer's bond, the sufficiency of the complaint was challenged by a general demurrer because, as claimed, it contained, as to many of the essential facts, only general conclusions which were properly denominable conclusions of law. It was alleged that plaintiff was the duly qualified treasurer, etc.; that his bond was duly approved, that his successor was duly elected and qualified; and there were other allegations of like character. The demurrer was overruled, the court saying:

"Where the ultimate fact essential to a cause of action is brought into existence by a series of detailed acts and events, it is entirely competent and sufficient to plead those detail acts according to their legal effect, and, when so pleaded in a complaint, that instrument is not obnoxious to a demurrer, but, at most, to a motion to make more specific. . . . "

Does not that fit the claimed insufficiency in the relation in question most completely?

I think the insufficiency claimed should be treated the same as in case of a formal demurrer and that so treated the relation is sufficient. If I be right, then all will agree the judgment should be affirmed.

In closing I may well remark, that, if I be right, the result

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is particularly unfortunate to respondent, whose counsel doubtless relied upon established rules of pleading as did the learned trial court, and the question upon which the case has turned was not raised in the court below, or here, by counsel.

WILBURN, by guardian *ad litem*, Respondent, vs. LAND and wife, imp., Appellants.

January 26—February 16, 1909.

Ejectment: Legal title or right of possession essential: Homestead: Conveyance without wife's signature.

1. Legal title or estate, or immediate legal right to possession, are essential prerequisites to the maintenance of an action of ejectment.
2. A conveyance by a married man of his homestead without the signature of his wife, even if it might, under sec. 2203, Stats. (1898), be effective as a contract to convey, did not vest in the grantee either legal title or right to possession such as would enable him to maintain ejectment.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

Action of ejectment tried to the court without a jury. Both parties deraign title from John Arquett: plaintiff under a quitclaim deed of an undivided one-half of the premises, expressing a consideration of $1,500, dated December 20, 1902, and recorded March 5, 1903, executed by John Arquett, alone, who at that time was a married man and with his wife occupied the premises in question as a homestead, they being owned in common, one half by Arquett and one half by his wife, and being within the statutory limits of area and value. The defendants claim title under a warranty deed from John Arquett and his wife, in consideration of $1,250, dated August 31, 1905, at which time John Arquett and his wife surrendered possession to defendants,

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who have since occupied the same by tenants. The court found as fact that the quitclaim deed to the plaintiff was for a good and valuable consideration, notwithstanding her own undisputed and unqualified testimony that she paid no consideration whatever, and that the transaction was a voluntary gift. She is a daughter of John Arquett. The court made conclusion of law that plaintiff was the owner of an undivided half interest in the premises and was entitled to recover on reimbursing certain sums paid by the defendants in discharge of incumbrances and taxes and making of certain improvements, and so adjudged, from which judgment the defendants appeal.

For the appellants there were briefs by *R. Reukema* and *Otto A. Lemke,* and oral argument by *Mr. Lemke.*

For the respondent there was a brief by *Rubin & Zabel,* and oral argument by *Mr. Zabel.*

DODGE, J. Legal title or estate, or immediate legal right to possession, are essential prerequisites to the maintenance of an action of ejectment. Sec. 3074, Stats. (1898); *Eaton v. Smith,* 19 Wis. 537; *Kinney v. Dexter,* 81 Wis. 80, 51 N. W. 82; *Grindo v. McGee,* 111 Wis. 531, 535, 87 N. W. 468. Under sec. 2203, Stats. (1898), the conveyance from John Arquett to the plaintiff of his homestead without his wife's consent evidenced by her joining in the deed was absolutely void, at least as a conveyance of the legal title. *Ferguson v. Mason,* 60 Wis. 377, 390, 19 N. W. 420; *Whitmore v. Hay,* 85 Wis. 240, 250, 55 N. W. 708; *Town v. Gensch,* 101 Wis. 445, 451, 76 N. W. 1096, 77 N. W. 893. True, this statute had, by construction, prior to its amendment by ch. 45, Laws of 1905, been somewhat emasculated of its protective efficacy, but such construction proceeded no further than to accord to an attempted conveyance without the wife's signature effect as evidencing an executory contract to convey at some future time and not until all homestead rights had been satisfied.

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Conrad v. Schwamb, 53 Wis. 372, 10 N. W. 395; *Town v. Gensch, supra; Jerdee v. Furbush,* 115 Wis. 277, 91 N. W. 661. Such a contract, however, is not effective to vest in the grantee either legal title or right of possession. To that end, a court of equity must decide whether, in equity, the conveyance of legal title should be specifically enforced, or plaintiff be left to legal remedies for breach. *Hanson v. Michelson,* 19 Wis. 498, 508; *Whitmore v. Hay,* 85 Wis. 240, 249, 55 N. W. 708; *Mulligan v. Albertz,* 103 Wis. 140, 143, 78 N. W. 1093; *Willey v. Hodge,* 104 Wis. 81, 80 N. W. 75; *Park v. M., St. P. & S. S. M. R. Co.* 114 Wis. 347, 353, 89 N. W. 532. It follows necessarily that plaintiff has not shown any right to recover in this action, even if the conveyance by Arquett and his wife of the homestead property to another and consequent abandonment of the premises as a homestead constitutes a condition upon which the deed might become effective as a contract to convey,—a question which we do not decide.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

DUFFY and another, Respondents, vs. RADKE, Appellant.

January 26—February 16, 1909.

Witnesses: Impeachment: Motion for new trial: Questions raised: Excessive damages.

1. **Evidence to impeach defendant as a witness was properly admitted where a foundation for it was laid by showing that the witnesses based their conclusions upon their knowledge of his general reputation among those with whom he resided, and the inquiry was restricted to whether, in view of defendant's general reputation for truth and veracity, the witnesses would believe him under oath.**
2. **A motion for a new trial, not specifying as a ground therefor that the damages are excessive, does not raise that question.**

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APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The plaintiffs, a firm of attorneys at Fond du Lac, commenced an action, at the request of the defendant, in the circuit court for Sheboygan county, to set aside deeds from the sheriff of Sheboygan county to M. Winter Lumber Company and from this company to Cudahy Bros. Company. The case was prosecuted to a judgment in favor of the defendant in this action. At this time the plaintiffs received from the present defendant the sum of $375, which was a payment in addition to others previously received. The following receipt was given:

"Milwaukee, Wis., Nov. 3, 1900.

"Received from *John Radke* three hundred seventy-five dollars ($375.00) in full for services up to that date in the case of *John Radke* against M. Winter Lumber Company pending in the circuit court for the county of Sheboygan and state of Wisconsin. We agreed to pay the clerk's fee.

"DUFFY & MCCRORY.
"JOHN H. RADKE.

"In the event of this case being tried again in circuit court, we hereby agree to do the work in circuit court free of charge.

"DUFFY & MCCRORY."

The case was appealed to the supreme court, and this action is brought to recover the balance alleged to be due the plaintiffs for their disbursements and their services in preparing proposed amendments to the proposed bill of exceptions, in attending circuit court at Sheboygan on two occasions for the purpose of settling the bill of exceptions, in preparing the brief on appeal, and in arguing the case in the supreme court. The amount claimed, inclusive of $44.29 which was disbursed for printing the brief and for hotel expenses and railroad fares, amounts to $321.29, with a credit of $50.

In his answer the defendant alleged that the payment receipted for was in full for all past and future services in the case by the plaintiffs.

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Upon the trial plaintiffs introduced evidence of the amount and value of the services rendered and of the amount of the disbursements. Evidence was introduced by the defendant tending to show that there was a settlement and payment in full for the services. Evidence by the plaintiffs was admitted impeaching the defendant. They also attempted to introduce evidence of specific acts which would tend to prejudice the jury against the defendant. This evidence was excluded by the court. The jury returned a verdict in plaintiffs' favor for the amount claimed. This is an appeal from the judgment on the verdict.

H. L. Eaton, for the appellant.

The cause was submitted for the respondents on the brief of *J. G. Hardgrove.*

SIEBECKER, J. The contention that the court erred in the admission of evidence to impeach the defendant cannot be sustained. The record shows that a foundation for the reception of such evidence was properly laid by showing that the witnesses based their conclusions upon their knowledge of defendant's general reputation among those with whom he resided, and the form of inquiry was properly restricted to the inquiry whether, in view of defendant's general reputation for truth and veracity, the witness would believe him under oath.

It is also claimed that the verdict is not supported by the evidence. This contention is met by the evidence of the plaintiff *McCrory.* He testifies that the services were rendered, as alleged, under an agreement with defendant to act as his attorneys in the action in circuit and supreme courts, that they were not fully paid, and that the charges were for services actually and necessarily rendered in the prosecution of the case to final judgment. It is not necessary to restate the various items of services so testified to to show that the amount awarded by the jury did not exceed the amount of the

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balance claimed by the plaintiffs. The motion for a new trial, specifying that the verdict is contrary to the law and the evidence, does not raise the question of excessive damages. To raise this question the motion must specifically assign that ground. *Howard v. Beldenville L. Co.* 134 Wis. 644, 114 N. W. 1114. The trial court properly awarded judgment for the amount found by the jury.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

HINTZ, Appellant, vs. WALD and another, Respondents.

January 26—February 16, 1909.

Life insurance: Change of beneficiary: Fraud: Undue influence: Evidence: Trial by jury or by court: Cancellation of instruments.

1. Findings that at the time of making a change in the beneficiary of his life insurance the insured was mentally competent, and that the change was not induced by fraud, coercion, or undue influence, are *held* not to be contrary to a clear preponderance of the evidence.
2. Where the relief asked was the cancellation, on the ground of fraud, of an instrument changing the beneficiary of life insurance, the issue was properly triable by the court.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The appeal is from a judgment in favor of the respondents and against the appellant, who were interpleaded defendants at the suit of the New York Life Insurance Company.

For the appellant there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.* As to the mental competency of the deceased, they cited *Holden v. Meadows,* 31 Wis. 284; *In re Lewis's Will,* 51 Wis. 101, 7 N. W. 829.

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William L. Tibbs, for the respondents: The action is equitable and triable by the court. *Fraedrich v. Flieth,* 64 Wis. 184, 25 N. W. 28; *Gunn v. Madigan,* 28 Wis. 158; *Fairbanks v. Holliday,* 59 Wis. 77, 17 N. W. 675; *Clark v. Mosher,* 107 N. Y. 118. The findings will not be disturbed unless contrary to a clear preponderance of the evidence. *Senour Mfg. Co. v. Clarke,* 96 Wis. 469, 471, 71 N. W. 883; *Momsen v. Plankinton,* 96 Wis. 166, 71 N. W. 98; *Menz v. Beebe,* 102 Wis. 342, 77 N. W. 913, 78 N. W. 601; *Bruce v. Miller,* 72 Wis. 404, 39 N. W. 554.

TIMLIN, J. The New York Life Insurance Company began this action of interpleader against the above-named defendants, who made conflicting claims to the proceeds of a policy of life insurance for $1,000 in the said company upon the life of Jacob L. Wald, in which policy the appellant, *Antoinette Hintz,* who was under an engagement of marriage with the insured, was named as beneficiary. On May 10, 1905, upon his deathbed and about an hour before his death, in the absence of and without the knowledge of *Miss Hintz,* Jacob L. Wald executed a writing making his brother, the respondent *Harry H. Wald,* and his sister, the respondent *Adele Henningfeld,* beneficiaries of the policy in question in place of *Miss Hintz.* The pleading of the latter averred that this writing was made while the insured was mentally incapacitated by sickness, and was induced by fraud, undue influence, and coercion practiced upon the insured by the respondents, and asked to have this writing canceled. The circuit court found that the insured was at the time in question mentally competent and that there was no fraud, coercion, persuasion, or undue influence used to induce the change of beneficiaries. These findings are assailed as not supported by the evidence.

It appears to us that notwithstanding the evidence is quite unsatisfactory, still there is evidence to support the findings.

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The attending physician and several of the friends of the dying man testified to his mental competency, and, although the facts and circumstances to the contrary are quite cogent, we do not feel authorized to overthrow the finding of the court below upon this point. Considerable persuasion was no doubt indulged in by the attending physician, and the finding of the court so far as it says that no persuasion was used is not correct. But whether this persuasion amounted to fraud, coercion, or undue influence is quite another question. The insured had been sick at or near Denver, Colorado, and the respondent *Harry* brought him back home to Milwaukee at some expense. The attending physician, at the instance of *Harry*, requested the insured to secure repayment of these expenses to *Harry* by a change of the insurance policy, and suggested to the insured that his time of life was short. A lawyer was sent for, who drew up and had signed by the insured a substitution of the respondents as beneficiaries.

Had the evidence disclosed nothing further it is probable the change of beneficiaries could not be upheld. But the respondent *Harry*, after having been made competent to testify on that subject by an examination of him by the appellant's attorneys as an adverse witness, which examination covered the transactions in question, testified, upon cross-examination or re-examination by his own counsel, that immediately following the interview between the insured and the attending physician above referred to he was called in to the bedside of the insured by the attending physician, and that thereupon the insured said to him that he wished to leave *Harry* $500 and $500 to *Adele Henningfeld*. A lawyer was sent for, who drew up a writing to this effect before seeing the insured and in an outer room at the suggestion of *Harry*. The lawyer took this writing to the bedside of the insured and read it over to him. The insured appeared conscious of what he was doing, and suggested a correction in the name of the respondent *Adele*, and, propped up in bed, signed the instru-

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ment so presented by making his mark, he being too weak to write.

This, in our opinion, presents a case on the evidence which might be decided in favor of or against the validity of the change of beneficiaries. The evidence presented a question of fact upon that subject. We find no such clear preponderance of evidence as is necessary in order to overthrow the findings of the court below. *Senour Mfg. Co. v. Clarke,* 96 Wis. 469, 471, 71 N. W. 883.

The appellant demanded a jury trial, which was refused, and she assigns error upon the refusal of the court below to grant the request. But she does not argue this at length or cite authorities. Considering the relief of cancellation demanded in the appellant's pleading, it seems that the issue was properly triable by the court. *Clark v. Mosher,* 107 N. Y. 118, 14 N. E. 96; *Fraedrich v. Flieth,* 64 Wis. 184, 25 N. W. 28.

By the Court.—Judgment of the circuit court is affirmed.

GRIMM, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

January 26—February 16, 1909.

Street railways: Collision with vehicle: Contributory negligence: Court and jury: Duty of person about to cross tracks.

1. In an action for injuries sustained in a collision with a street car there was evidence tending to show that as plaintiff got into his inclosed laundry sleigh, which was fronting north on the west side of a street, he saw the car approaching from the north and at least 900 feet away and saw several people standing on the corner of an intervening street apparently intending to take the car; that he immediately started to turn around, but did not look again at the car; that after partially making the turn his back was toward the car and his vision otherwise obstructed; that in making the turn the fore feet of the horse

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went just beyond the east rail of the south-bound track; that the time which would be consumed in making the turn and clearing the track would not exceed half a minute; that the sleigh had almost cleared the track when it was struck; that the car was running at an excessive rate of speed; and that the motorman failed to use reasonable precaution to prevent the collision. *Held*, that it was a question for the jury whether plaintiff was negligent.

2. Unless there is enough in the testimony to enable a court to say, as a matter of law, that the plaintiff was guilty of contributory negligence, a nonsuit should not be granted on that ground.

3. Contributory negligence is a defense that must ordinarily be shown by affirmative evidence or by logical inference from such evidence, and is not established by a mere absence of proof.

4. A person about to cross the track of a street railway must, as in the case of a steam railroad, look and listen for approaching cars; but there is a distinction between the two cases, in that the person wishing to cross the street railway track in advance of an approaching car has the right of way and may proceed without being guilty of contributory negligence if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car, assuming that it is moving at a reasonable and lawful rate of speed—provided, however, that if, in the exercise of ordinary care, the person about to cross can see that the car is approaching at an unlawful or unusual speed, he must take that fact into consideration in deciding whether there is time for him to safely clear the track.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This action is brought to recover damages for injury to person and to property. The plaintiff was the owner of a laundry sleigh and horse, and at about 5:30 o'clock p. m. of February 8, 1907, delivered laundry to a building located on the west side of Third street and about midway between Locust street on the north and Hadley street on the south. Third street is one of the principal business streets of the city of Milwaukee, and a double track street car line is operated thereon. While making the delivery the plaintiff's horse

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faced north and stood adjacent to the curbing on the west side of the street. After the laundry was delivered the plaintiff picked up the weight to which a line had been attached for the purpose of holding the horse, placed the weight in the sleigh, and stepped into the seat. While doing so, and before starting the horse, he looked to the north and observed a south-bound street car approaching him, which, according to his calculation, was about 900 feet distant at the time. He immediately started to turn his horse around so as to proceed homeward. In making the turn it appeared that the front feet of the horse extended a little beyond the east rail of the south-bound track. The runners of the sleigh were carried over one, if not both, of the rails of the same track. Before the turn was completed, so that the sleigh would clear the passing car, the collision occurred which resulted in the injury and damage complained of.

The sleigh was completely inclosed, having a vestibule in the front and a glass door in the rear. It also appears that there was a glass in the front of the vestibule, but whether or not it extended to the sides thereof does not appear from the testimony. The plaintiff testified that it would require less time than half a minute to make the turn. He also testified that, when he looked north and saw the car approaching, he also saw some people at the southwest corner of Third and Locust streets, apparently waiting to take the approaching car. The car did not stop there, however, and there is testimony tending to show that no warning was given immediately before the collision and that the motorman did not make any attempt to lessen the speed of the car until it was too late to avoid the collision; furthermore, that there was nothing to obstruct the motorman's view of the plaintiff's vehicle. There was also some testimony tending to show that the car in question was proceeding at about twice the ordinary rate of speed.

At the close of the plaintiff's evidence the court granted a nonsuit, on the ground that the plaintiff should have looked

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again in the direction of the approaching car, before entering upon the tracks, to ascertain whether it was safe to attempt to make the turn. Judgment was entered dismissing the complaint, from which judgment this appeal is taken. The error assigned is the ruling of the court in granting a nonsuit.

For the appellant there was a brief by *Houghton & Neelen,* and oral argument by *F. W. Houghton.* They cited Joyce, Electric Law, §§ 570, 572, 594; *McCormack v. Nassau E. R. Co.* 18 App. Div. 333, 46 N. Y. Supp. 230; *Indianapolis St. R. Co. v. Marschke,* 166 Ind. 490, 77 N. E. 945; *Indianapolis St. R. Co. v. Bolin,* 39 Ind. App. 169, 78 N. E. 210; *Williamson v. Old Colony St. R. Co.* 191 Mass. 144, 77 N. E. 655; *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 608; *Hanlon v. Milwaukee E. R. & L. Co.* 118 Wis. 210, 215, 217.

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Clarke M. Rosecrantz, for the respondent, contended, *inter alia,* that the trial court's construction of ambiguous testimony will rarely be disturbed. *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 210. The law condemns the plaintiff's conduct as negligent. *Dummer v. Milwaukee E. R. & L. Co.* 108 Wis. 589; *Guhl v. Whitcomb,* 109 Wis. 69, 75; *Goldmann v. Milwaukee E. R. & L. Co.* 123 Wis. 168. The following cases declare that when, "as established by the result," a traveler enters upon a track at a time when a car is in plain sight, and its location and speed such as to make some diminution of the speed of the car necessary in order to insure the traveler's safety, he accepts the consequences of attempting to make the crossing, and voluntarily assumes the risk: *Flynn v. Eastern R. Co.* 83 Wis. 238, 245; *Hogan v. Winnebago T. Co.* 121 Wis. 123; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 155, 156; *Marshall v. G. B. & W. R. Co.* 125 Wis. 96; *Clemons v. C., St. P., M. & O. R. Co.* 137 Wis. 387.

BARNES, J. The evidence fails to disclose the width of the street or the distance between the curb and the south-bound

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track. It is in many respects unsatisfactory, apparently because the witnesses were unable to express themselves understandingly. There is evidence from which the jury might have found that when the plaintiff took his seat in the sleigh and lifted in the weight to which the horse had been hitched, he looked north and saw a car approaching him and about 900 feet distant, with an intervening street, upon the corner of which several people were standing, apparently for the purpose of taking the car; that plaintiff immediately started to turn around, but did not look again; that after partially making the turn his back would be toward the approaching car and his vision otherwise obstructed; that in making the turn the front feet of the horse extended just beyond the east rail of the south-bound track; that the length of time that would be consumed in making the turn and clearing the track would not exceed half a minute and might be somewhat less; that the car was running at an excessive rate of speed; and that the motorman failed to use reasonable precaution to prevent the collision. There was also some testimony in the case which tended to show that the car was somewhat further away from the plaintiff than he thought it was when he looked.

The question is, Do the facts stated present so clear a case of want of ordinary care on the part of the plaintiff as to warrant a trial court in saying that there was no question for the jury to pass upon in that regard? There is no evidence in the case tending to show that plaintiff was mistaken in estimating that the car was at least 900 feet away from him when he looked. His statement of the time it would take him to turn around so as to clear the track is an estimate, but does not appear to be an unreasonable one. If he only proceeded at the rate of two miles an hour he would travel eighty-eight feet in half a minute. It would seem that this was a greater distance than it was necessary for him to traverse in order to turn his vehicle and clear the track. Here again we find great uncertainty in the testimony as to the distance his horse

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in fact did travel, or the speed at which it traveled, before the collision. The speed of the approaching car would have to slightly exceed twenty miles per hour in order to travel 900 feet in one half minute. There is also a lack of testimony as to the usual and customary speed of cars in the outskirts of the city, and plaintiff does not give us the benefit of any knowledge or experience he may have had upon the subject. The lack of evidence on certain points enumerated, however, does not materially assist the contention of respondent. Unless there is enough in the testimony to enable a court to say, as a matter of law, that the plaintiff was guilty of contributory negligence, the nonsuit should not have been granted on that ground.

If plaintiff did not exercise ordinary care, it must be, as far as the testimony now before us discloses, because he failed to look again at the approaching car before driving his horse upon the tracks, or because he attempted to make the turn after observing that the car was but 900 feet from him. There is nothing to show, directly at least, that he drove unnecessarily slow or that he continued to drive along the track a greater distance than was necessary. The testimony of the witness Kraschinsky is somewhat confusing upon the latter point; too much so, we think, to draw any reasonable inference therefrom.

This court has many times defined the duty of a traveler to look and listen in approaching a railway track. Two such cases have been decided during the present term (*Clemons v. C., St. P., M. & O. R. Co.* 137 Wis. 387, 119 N. W. 102, and *Smith v. C., M. & St. P. R. Co.* 137 Wis. 97, 118 N. W. 638), and the decisions of the court upon this point are numerous; so numerous that the law thereon should be considered settled in so far as this court can settle it. But the rule is to be applied with reason. Manifestly the plaintiff could make no accurate estimate of the speed of the approaching car considering the time of day and where he was

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with reference to it. In the very short space of time it took him to swing his horse from the curbing to the car tracks the position of the car would, in all probability, no more indicate peril than did its position when he did look. If he had been mistaken as to the place the car was when he saw it, and it was in fact much nearer than he supposed, the peril might be avoided by a second look before driving his horse upon the track, but it does not appear that he was mistaken. If he was bound, under the peculiar circumstances of this case, to take a second look, it was because he was negligent in the first instance in concluding to attempt to turn around.

A person approaching the track of a steam railroad is bound to look for approaching trains, and must use his sense of sight at the last moment of opportunity before passing the line between safety and peril, and mere diversion of attention is not a sufficient excuse for failure so to do. He is not at liberty to calculate how long it will take an approaching train to reach the crossing if running at a lawful and usual rate of speed. He must anticipate that it may be running at an excessive speed and may reach the crossing before he can safely pass it. *Clemons v. C., St. P., M. & O. R. Co., supra; Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142; *Schroeder v. Wis. Cent. R. Co.* 117 Wis. 33, 93 N. W. 837; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 82 N. W. 295; *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378, 75 N. W. 169; *Hain v. C., M. & St. P. R. Co.* 135 Wis. 303, 116 N. W. 20; *Marshall v. G. B. & W. R. Co.* 125 Wis. 96, 103 N. W. 249.

The obligation to use the senses of sight and of hearing before proceeding to cross the tracks of a street railway company is no less mandatory than in the case of crossing the tracks of a steam road. *Goldmann v. Milwaukee E. R. & L. Co.* 123 Wis. 168, 170, 101 N. W. 384; *Dummer v. Milwaukee E. R. & L. Co.* 108 Wis. 589, 84 N. W. 853; *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663.

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In the absence of any showing as to the distance the plaintiff's horse traveled, or the length of time it traveled after the plaintiff looked at the approaching car and before it passed the danger line, the court can hardly assume that the failure to look a second time was negligence. The time may have been so short that the distance traveled by the car would have been a negligible factor in determining whether or not the turn might be made with safety. Contributory negligence is a defense that must ordinarily be shown by affirmative evidence or by logical inference from such evidence, and is not established by a mere absence of proof. *Haetsch v. C. & N. W. R. Co.* 87 Wis. 304, 58 N. W. 393.

Under the authorities cited and many others that might be cited, if the plaintiff had driven on the tracks of a steam railroad under the circumstances that he entered upon the tracks of the street railway company here, the court might well say, as a matter of law, that he was guilty of contributory negligence. And this leads us to a consideration of the question whether any distinction should be drawn between the two classes of roads, particularly where one is operated in the busy streets of the city of Milwaukee. Important as the street railway lines are, it goes without saying that their right to the use of public streets is not exclusive. Cars are run on such lines, particularly at certain periods of the day, with great frequency. They make numerous stops and do not attain that high velocity that is required on steam roads, where stops are comparatively infrequent. Street cars are usually run singly, and, necessarily, are run at times with reference to obstructions in their route. Steam roads run comparatively few trains, run them over their own right of way, and only occasionally cross a highway. They often run at great speed, and are usually heavy and cumbersome and cannot be readily brought to a standstill. This question was considered in *Tesch v. Milwaukee E. R. & L. Co., supra,* and while no comparison is made between the two classes of roads, what is there held is not in accord with the cases defin-

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ing what is negligence in attempting to cross the tracks of a steam road. It is said:

"A person desiring to cross a street-car track in advance of an approaching car has the right of way if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care. If in the circumstances stated, other than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track, by the exercise of ordinary care, he must take that into consideration in determining whether there is time to safely clear the track; the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else."

This rule is manifestly sound if ordinary care is "such care as persons of ordinary care and prudence observe in their business," or "such care as the great mass of mankind, or the majority of mankind, observe in the transactions of human life," under the same or similar circumstances. *Dreher v. Fitchburg,* 22 Wis. 675; *Duthie v. Washburn,* 87 Wis. 231, 233, 58 N. W. 380; *Nass v. Schulz,* 105 Wis. 146, 81 N. W. 133; *Hayes v. C., M. & St. P. R. Co.* 131 Wis. 399, 111 N. W. 471. A court cannot say, as a matter of law, that persons of ordinary care using the streets of the city of Milwaukee do not observe the distance cars are from the crossings and the probable rate of speed at which they are proceeding and do not calculate whether there is sufficient time to cross the tracks in advance of the car. If they did not do so, and waited until all cars were out of sight, they might find it difficult to cross at all.

The plaintiff had almost cleared the track when his vehicle

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was struck. A few steps further, as we read the testimony, would have placed him out of danger. If it is true, as one witness testified, that the car proceeded at twice the ordinary rate of speed, and that plaintiff could not determine from his location that the car was running at such an excessive speed, it would seem to be a fair question for the jury to say whether he was guilty of negligence in attempting to make the turn. Considering the facts as shown on this trial, and they are unsatisfactory in many important particulars, we think the court should have permitted the jury to say whether or not the plaintiff was negligent in attempting to turn around in the manner in which he did, the car which injured him being 900 feet distant from him at the time he started to make the turn.

By the Court.—Judgment is reversed, and cause remanded for a new trial.

STATE, Appellant, vs. SCHMIDT, Respondent.

January 27—February 16, 1909.

Physicians and surgeons: Registration: Review of decision of Board of Medical Examiners: Who are "reputable physicians."

1. Ch. 422, Laws of 1905, giving to the circuit courts jurisdiction to annul any certificate of registration procured from the Wisconsin State Board of Medical Examiners by fraud or perjury or issued through error of the board, does not contemplate a trial *de novo* of the questions presented to the board. The term "error" is used therein in the sense in which it is ordinarily understood as applied to trials in courts before juries,—that is, aside from jurisdictional errors such as would render the decision void, it is confined to such absence of evidence in support of the board's decision that in no reasonable view thereof could its decision be justified, or prejudicial refusals to admit or exclude evidence, or other prejudicial misapprehensions of law.
2. The term "physician," as used in ch. 87, Laws of 1899, providing for registration of reputable resident physicians who were on July 1, 1897, in the actual practice of medicine in this state,

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includes any person, of whatever school or of no known school, engaged in good faith in treating human ills by any remedy or remedies, however simple, so as to be known among the people as a physician,—especially in view of ch. 264, Laws of 1897 (referred to in the act of 1899), wherein the term is expressly defined as including every person "who shall, for a fee, prescribe drugs or other medical or surgical treatment for the cure or relief of any wound, fracture, bodily injury, infirmity or disease."

3. The term "reputable," as used in said ch. 87, Laws of 1899, means reputable in the common lexical sense, and does not necessarily imply graduation from a reputable medical college or membership in an incorporated medical society.

4. In this case a certificate of registration issued, under ch. 87, Laws of 1899, upon competent proof, to one who stated in his application that he belonged to the "physio-medical and hydropathic" school, is *held* not to have been issued through error of the Board of Medical Examiners.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action under ch. 422, Laws of 1905, to revoke a certificate of registration of defendant as a resident practicing physician of this state July 1, 1897, such registration being under ch. 87, Laws of 1899. The material questions raised by the pleadings were: First. Did defendant by fraud or perjury, or both, induce the Board of Medical Examiners to act favorably upon his application for registration? Second. Did the Board of Medical Examiners commit error in deciding in defendant's favor upon his application?

There was much evidence tending to show defendant, when he made his application and during the time he had held himself out as a medical practitioner, was not, in the general sense, an educated or well-trained man in the profession of medicine and surgery, or either, and that his nonprofessional education was quite limited, but that at the time of his application for registration he held a diploma of a pretended medical college, located at Chicago, Illinois, styled "The Independent College," which taught the kind of treatment called Physio-Medical Hydropathic; that of treating diseases by simple

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remedies, teas of various kinds and nonpoisonous drugs of a cathartical nature, and by use of water in a great variety of ways; that he studied a considerable length of time in Germany and in this country with physicians and surgeons of the standard schools, studied also from books; attended for a time the Milwaukee Medical College; took a correspondence course with the Independent College of Chicago; attended a few lectures there; and obtained from such college its regular diploma and the degree of M. D. as a physio-medical man and hydropath. Further that he obtained from such college after it conferred upon him such, the degree of Ph. D. for presentation of an original paper on hydropathy; that when he obtained such degrees he was well posted in the physio-medical and hydropathic school and opened an office, holding himself out as a physician, and thereafter practiced according to such school. There was evidence tending to prove that the so-called Independent College had no worth-while standing, with the profession generally, at the time defendant obtained his diploma, nor thereafter, and that the Board of Medical Examiners knew that fact when they decided upon the application. There was further evidence to the effect that defendant made his application in writing under oath, as required by the rules of the board; that the application stated he was a resident practicing physician of this state July 1, 1897, of the physio-medical hydropathic school, holding the degrees of M. D. and Ph. D. from the Independent College. There was further evidence that the truth of the facts stated in the application, as to defendant having been a resident practicing physician at the time stated, according to the practice adopted by the board, was verified, as was the moral character and reputability of defendant, by the testimony of a reputable physician and a nonprofessional man, and on the faith thereof, regardless of defendant's diploma, he was registered to practice and the certificate was issued. There was no controversy on the evidence but that defendant was, on the 1st day of July, 1897,

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in the business, in this state, of treating diseases by the simple methods used by his school, and no question but that, at the time of his application, he was a man of good moral character, and that the two witnesses who supported the allegations of the petition did so honestly and with general knowledge of the facts. On this state of the case the trial court, on motion of defendant's counsel for a directed verdict in his favor, decided that the board did not commit error in deciding the application and were not imposed upon by defendant, and, accordingly, granted the motion.

For the appellant there was a brief by the *Attorney General* and *A. C. Backus,* district attorney, and *A. C. Umbreit,* of counsel, and oral argument by *Mr. Umbreit.* They contended, *inter alia,* that under the act of 1899 only the following persons were entitled to registration: All persons versed or skilled in the art of healing, possessing some evidence of competent knowledge of the human system, the diseases to which it is subject and the proper remedy for their cure or alleviation, such evidence consisting either in a diploma from a reputable medical college, or a certificate of membership in the State Medical Society, or in some county medical society legally organized in this state, provided they possessed such evidence of qualification and were in the actual practice of medicine on the 1st day of July, 1897, and at the time they made application for registration. *Sutton v. Facey,* 1 Mich. 243; *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 577; *State ex rel. Granville v. Gregory,* 83 Mo. 123.

M. T. Halphide, for the respondent.

MARSHALL, J. Ch. 264, Laws of 1897, provided for a state board of medical examiners and required all beginning to practice medicine or surgery in this state after July 1, 1897, to first procure a certificate of qualification from such board. It did not deal in any respect with members of the profession in actual practice in this state on such date.

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Ch. 87, Laws of 1899, enlarged the scope of the board's jurisdiction by making the privilege of every person who was a resident practicing physician in this state July 1, 1897, to continue in such practice, contingent upon his obtaining a certificate of qualification from the board within a prescribed time and becoming duly registered with the board. The law prescribed, as a condition of granting the certificate, that the application should be made therefor and the applicant submit in support thereof his "diploma or other credential or evidence of qualification" and be a "reputable resident physician or surgeon of good moral character who was on the first day of July, 1897, in the actual practice of medicine or surgery in the state of Wisconsin." In mandatory language the board was required, upon such application being made by a person competent, as provided in the law, to make it and supported by the evidence of qualifications prescribed, to grant the registration and certificate.

Ch. 422, Laws of 1905, gave the circuit courts of this state jurisdiction to annul any certificate obtained as aforesaid, in case of the issuance thereof resulting from error of the board or fraud or perjury, the issues of fact to be determined by a jury, if desired by either party.

From the foregoing it will be seen that the Board of Medical Examiners, in acting upon respondent's application, was required to decide, by the exercise of *quasi*-judicial authority, first, whether respondent was, July 1, 1897, a resident physician or surgeon and actually engaged in practice in this state; second, whether he was, at the time of the application, a reputable physician or surgeon; third, whether he was a man of good moral character.

The board was left free to prescribe its own rules of procedure, governed only by the requirement that the applicant should submit the evidence of his qualification. That, in the broadest sense the language can be reasonably viewed, related to all of the three matters of fact mentioned. It might pos-

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sibly be held more restrictive, but for the purposes of this case the broader view will be taken to be the correct one.

The board made rules respecting the manner of making applications for registration and the manner of proof, consistent with the law. There is no question that, if the jurisdiction of the board was duly invoked under its rules, no error was committed by it in entertaining the matter. The requirement as to *quantum* of proof was satisfied as indicated in the statement. There was sworn testimony of respondent and two others, one being a physician in good standing, as to his professional status being as he represented it, July 1, 1897. The board had the further testimony of the two witnesses as to respondent being a "reputable physician or surgeon, of good moral character," and worthy of professional recognition. It had before it sworn evidence as to the college which granted the degrees of M. D. and Ph. D. and the kind of treatment of human infirmities respondent pretended to be skilled in, and that was indicated by reference to the college which graduated him, or pretended to have graduated him. With all that in hand, which comprised all proofs of the nature commonly required, and with a general idea that the college conferring the degrees was not regarded as creditable, by physicians at least of the standard schools of medicine or according to the requirements of our statutes, the decision was made. Not particularly upon the strength of the college being reputable, but upon "practice" and other proofs.

In the further consideration of this case we must appreciate that the act of 1905 did not contemplate a trial, *de novo,* of the questions presented to the board. Aside from whether it was imposed upon by fraud or perjury, the scope of the trial was limited, by the act, to the question of whether the board committed error. Just what the legislature intended by the use, unexplained, of the word "error" may admit of some doubt, but we are constrained to believe that the term was used in the sense in which it is ordinarily understood as applied to

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trials in courts before juries. That is, aside from jurisdictional errors in the limited sense of such as would render the decision void, it is confined to such absence of evidence in support of the board's decision that, in no reasonable view thereof, could its decision be justified, or prejudicial refusals to admit or exclude evidence, or other prejudicial misapprehensions of law; error which might properly be denominated jurisdictional, as regards trials before *quasi*-judicial bodies,—errors which, in the general sense, are purely judicial, in the sense that a decision is binding on all concerned, till set aside by some proper proceedings for that purpose.

Now, no claim is made but that the board exacted and received competent proof upon all questions it was called upon to decide. There can be no question but that the board was warranted in deciding as it did, unless its conception of what the term "physician" and the term "reputable" mean as used in the law is wrong. That it did not understand the term "physician," as applied to persons practicing the healing art July 1, 1897, referred only to such as possessed that technical knowledge of the human system and knowledge of drugs and other remedies and how to administer them, commonly supposed to be possessed by members in good standing of the great schools of medicine, is evident, because they knew, or had good reason to know, that the Independent College did not afford preparation for the profession of that sort, and they were fully informed by respondent's disclosures that he made no pretense of belonging to any other school. The board must have supposed that a person, treating human infirmities by the remedies suggested by the term "physio-medical and hydropathic," July 1, 1897, was a "physician," within the meaning of the statute. It was in that sense respondent used the term in his application. If under the law it was proper to so use it, certainly he cannot be accused of having imposed upon the board, nor the board be rightly held to have committed error in deciding in his favor on that point.

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It is a waste of time, in our judgment, to view the term "physician" from the standpoint of members of the profession belonging to the few great schools. It may be admitted that many, and perhaps most, of them think that no other healer should be known as a "physician" or should be allowed to treat human ills for pay. It may be further admitted that judicial and other definitions of the term may be found quite in harmony with that view. The learned counsel for appellant refers to such, notably *Sutton v. Facey,* 1 Mich. 243. Neither need we go to the lexical definitions, where we would find a wide range, down to the simple definition, "one who administers medicine to cure disease." That medicine includes anything, however simple, "administered in the treatment of disease," and that disease includes any kind of disorder of the human system, needs no support other than our common knowledge.

Manifestly, the legislature conceived that it was dealing with the entire class of persons known as physicians, in the broadest sense of the term, not in any narrow sense, which would favor those claiming, and perhaps entitled to, superior distinction. The purpose was very far from that of creating a monopoly in favor of special schools of medicine. The term was evidently used in its proper sense, that of including any person of whatever school, and whether belonging to any known school, engaged, in good faith, in treating human ills by any remedy or remedies, however simple, so as to be known among the people as a physician.

What has been said as to the legislative meaning is manifest, in our judgment, from the very fact alone that it was dealing with an existing condition which it did not intend to disturb except to the extent of weeding out disreputable and immoral characters. But that is placed beyond all reasonable doubt by the fact that the law of 1897, to which the law of 1899 referred, expressly defined the term, making it include every person "who shall, for a fee, prescribe drugs *or*

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other medical or surgical treatment for the cure or relief of any wound, fracture, bodily injury, infirmity or disease." Sec. 7, ch. 264, Laws of 1897 (sec. 1435*f*, Stats. 1898).

It follows that respondent, clearly, did not falsely pretend that he was a physician July 1, 1897, nor did the board err in deciding that he was such.

There being no question but that respondent's character for morality was amply and honestly established before the board, there is only left to be determined whether the board had the proper conception of the term "reputable," and, if so, whether it was imposed upon by false evidence as to the fact.

That the board was not imposed upon is clear, unless the term "reputable" as used in the corroborating testimony, as contended by appellant's counsel, necessarily suggests, as matter of law, graduation from a reputable medical college, or membership in an incorporated medical society under the laws of this state.

That the professional corroborating witness did not so understand the term is evident, and that the board did not so understand it is likewise evident, from the fact that it registered respondent on "practice." It did not give significance to his diploma; it did not require any specific evidence as to membership in a medical society, and its practice in that respect was the same as in cases generally, of which it had hundreds. So no fraud was committed on the board, intentional or otherwise.

Did the board commit error as to the meaning of the term "reputable"? Here is the bone of appellant's contention. The claim is not new, nor, from any worth-while standpoint of the medical profession, is it strictly reputable to insist that a physician or surgeon, however learned in fact, and however distinguished for his actual accomplishments in relieving human suffering and curing human ills, is disreputable unless he belongs to some incorporated medical society or holds a diploma from some reputable medical school. We may well

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know that it is possible that there are some very eminent outside men, so to speak, and probably were in the infancy of the regulation system we are dealing with, whose very shoes, in a professional sense, neither any one of many members of incorporated medical societies, nor holders of diplomas from reputable colleges, nor the faculties of such colleges, is worthy to untie. This court has said, and other courts have said, that the term "reputable" as used in the statute has no such legal and technical meaning as counsel for appellant claims for it. Therefore, until the legislature shall have unmistakably used it in such sense, no such meaning can be given thereto by judicial construction.

The word "reputable" has a plain, ordinary meaning having reference to general character for some honorable work. Whether one is reputable or not, means whether he is worthy of praise or not in the particular line under consideration. It involves a mere question of fact, determinable by the common idea of men competent to judge, based on knowledge or reasonable means of knowledge. In *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587, this court rejected the idea now pressed upon our attention, holding that the term is not used in the law in any restrictive and particular sense, but, broadly, to convey the common meaning, generally ascribed thereto in everyday ordinary expressions calling for its use. *People ex rel. Sheppard v. Ill. State Board,* 110 Ill. 180, is to the same effect. Reputable means reputable in the common lexical sense and nothing else. If one is regarded as honorable and praiseworthy as a member of the medical profession, of whatever school, or whether classed with any particular school, by reason of the character of his work and his conduct professionally, he satisfies the statutory essentials of reputability as to his particular line, though he may never have crossed the threshold of a medical college or been a member of any medical society.

Thus it will be seen the board, on this branch of the inquiry, was neither imposed upon nor did commit error.

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Whether as matter of fact, as an original matter, respondent possessed the qualifications one would expect to characterize a physician or not, as before indicated, was not for the circuit court, nor is it for this court to decide. The board had full authority to inquire into the matter. If the proofs produced before it were honestly produced; if it was not imposed upon, and had evidence before it on all material points and had reasonable grounds on such evidence for its decision, as in our judgment the proofs in the circuit court established without reasonable question, then, of course, the verdict was properly directed. It is the opinion of the court that the error complained of must be held not well taken.

By the Court.—The judgment is affirmed.

SIEBECKER, J., dissents.

ISAACSON, Appellant, vs. WISCONSIN TELEPHONE COMPANY, Respondent.

January 27—February 16, 1909.

Master and servant: Liability for injury from defective appliance.

A platform four feet square with a rope at each corner by which it was to be tied at the proper height to projections on telephone poles was furnished by a telephone company to its cable splicer and his assistant, to be kept in their custody and used in their work. After it had been in use by them for several months one of the ropes parted, precipitating them to the ground, and the assistant was injured. *Held*, that the platform being a mere appliance, sufficient when furnished, and the extent of the wear and weakening of its ropes being better known to the employees who used it than to any one else, the employer was not liable.

APPEAL from a judgment of the circuit court for Milwaukee county: OREEN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action for personal injury arising under the following facts: Plaintiff was employed as helper or assistant cable

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splicer, in which employment it was the duty of the splicer and himself to go about the system and splice cables, many of them at a considerable elevation, in which case the work had to be done on one of the telephone poles. Among the appliances and tools furnished the two men to perform their work was a platform, about four feet square, with a rope about eight feet long through each corner thereof, which platform, when necessary, they hoisted to the proper height and tied, by means of the four ropes, to projections from the pole. Plaintiff had been working at this kind of employment nearly four months, and as helper to the same splicer about three, when on the day in question they hoisted the platform to a height of about twenty-five feet, and the splicer secured it in position by tying the ropes to the iron steps in the pole, and undertook to perform certain work in splicing a cable. The plaintiff, at the direction of the splicer, ascended the pole to aid in the work and took position with the former upon the platform. A few minutes thereafter one of the ropes parted and the two men were precipitated to the ground and injured. The negligence claimed was in the failure to supply the plaintiff with a safe place to work, in that the rope which parted had become weakened and defective and not adequate to support the platform. Some evidence was offered tending to show that said rope was old and weakened at the time of the accident. The platform had been in the manual care and possession of the two men throughout the entire time of plaintiff's employment as helper to this particular splicer, and of the latter for some time before.

At the close of the plaintiff's evidence the court, on motion, entered judgment of nonsuit, from which the plaintiff appeals.

For the appellant there was a brief by *Carroll & Carroll,* and oral argument by *W. J. Carroll.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *A. W. Fairchild.*

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DODGE, J. The platform in question was very obviously a mere appliance furnished to plaintiff and his co-worker to be retained by them in their possession like other tools and to be used when necessary in accomplishing the work on which they were employed. *Goltz v. M., L. S. & W. R. Co.* 76 Wis. 136, 44 N. W. 752; *Van den Heuvel v. Nat. F. Co.* 84 Wis. 636, 54 N. W. 1016; *Hoveland v. Nat. B. Works,* 134 Wis. 342, 348, 114 N. W. 795; *Butler v. Townsend,* 126 N. Y. 105, 26 N. E. 1017; *Hutton v. Holdbrook, C. & D. C. Co.* 139 Fed. 734. It differed in no degree from a ladder with which to accomplish similar work, nor in principle from the climbers to attach to their feet, or the other tools carried by them. It was simplicity itself, at least with reference to the defect complained of. A board platform with four pieces of rope in the corners, which ropes were handled and used by the employees every time they had occasion to use the platform, and of the extent of the use and wear of which they knew better than anybody else, obviously falls within the reason of the rule expressed in *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841:

"This exemption [of the employer] from liability is, we believe, in all cases based upon the condition that the defect and peril are such that no superiority of knowledge in the master over the employee exists or can be presumed. . . . Another qualification of the master's liability indulged in case of such simple tools and appliances is exemption from a duty to inspect to ascertain the development of defects or disrepair in the course of their use, based also upon the assumption that such conditions are as much within the observation of the employees as of the master, if not more so."

Whether original insufficiency of so simple and commonly known an article as a piece of rope would cast liability on the employer need not be discussed, for the undisputed evidence excludes such situation. This rope had been furnished and had proved sufficient for several months, during which had occurred, necessarily and of course, some measure of impair-

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ment from exposure to weather and from friction and wear. The master, a corporation, having delivered this appliance over to the two men, plaintiff and another, to be kept in their custody and used by them, could gain information of the development of such a defect as the progressive impairment or weakening of the rope only through the eyes of those employees themselves. They knew the extent and frequency of its use and could observe, as no one else could, the development of any such defect in any of the four ropes. No distinction exists between this and the case of a weakened rung in a ladder, a worn handle or a loosened head of a hammer, or a dulled canthook or pinchbar, all of which have been held to fall within the rule above stated. *Corcoran v. Milwaukee G. L. Co.* 81 Wis. 191, 51 N. W. 328; *Holt v. C., M. & St. P. R. Co.* 94 Wis. 596, 598, 69 N. W. 352; *Borden v. Daisy R. M. Co.* 98 Wis. 407, 74 N. W. 91; *Olson v. Doherty L. Co.* 102 Wis. 264, 78 N. W. 572; *Meyer v. Ladewig,* 130 Wis. 566, 110 N. W. 419.

The evidence failed to show any failure of duty on the part of defendant on which plaintiff can predicate liability to himself.

By the Court.—Judgment affirmed.

SEIDEL, Administrator, Respondent, vs. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellant.

January 27—February 16, 1909.

Contracts: Failure in strict performance: Waiver of forfeiture: Life insurance: Acceptance of premiums after default.

1. Where, by a failure of some exact performance, a forfeiture is imposed on one party by the strict terms of an agreement, conduct of the other party sufficient to induce a belief that a modified performance is satisfactory and will be accepted as equivalent to strict performance will justify a conclusion that the

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parties have assented to a modification of the original terms or that the obligee has waived strict performance.

2. Although by its terms a life insurance contract lapsed upon default in payment of any quarterly premium or instalment, yet the conduct of the insurance company during a period of more than two years prior to the death of the insured, in collecting and receiving after they were due all of such instalments except one (which was paid on the last day of grace) without anything in the course of dealing to suggest that the contract had been terminated and that there had been a reinstatement after a lapse in the manner specified in the contract, is *held* to have constituted a waiver of strict performance, notwithstanding the company in its correspondence and written notices insisted that no stipulation had been waived or modified; and the company is estopped from insisting on a forfeiture and is liable on the contract, although an instalment due three days before the death of the insured was not tendered until after and on the day of such death and was then refused.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

George W. Goes, on November 18, 1901, applied to the defendant for a twenty-year five per cent. registered gold bond for $10,000, in accordance with the terms of the defendant's "contract of sale." The contract provided for the payment to the defendant of an annual instalment of $794.60 on November 27th of each year, and was protected by a life assurance for an amount equivalent to the bond applied for on the endowment plan with an accumulation period of twenty years.

The conditions of the contract essential to the purposes of this case are as follows:

"III. *Grace in the payment of instalments.* Should default be made at any time hereafter in the payment of any instalment due under this contract as herein provided, the society will waive such default and accept the payment of said instalment provided the amount thereof with interest thereon at five per cent. per annum from date of default be tendered to it within thirty days after such default.

"IV. *Reinstatement.* Should this contract lapse by reason

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of the nonpayment of any instalment when due, it may be reinstated at any time upon the purchaser furnishing evidence of good health satisfactory to the society and the payment of all arrears and any indebtedness to the society existing under this contract at the date of lapse, with interest thereon at five per cent. per annum.

"The holder of this contract is protected by life assurance hereunder as follows:

"(1) In the event of the death of the purchaser within twenty years from the register date of this contract (provided all previous instalments have been duly paid and this contract is in force), any annual instalments falling due after said death will be canceled and this contract will thereupon mature; and upon the receipt of satisfactory proof of said death, the society will immediately deliver the gold bond provided for herein, or in lieu thereof will pay the equivalent value of said bond in cash, namely, thirteen thousand dollars, to the purchaser's executors, administrators or assigns."

"(8) The entire agreement between the society and the purchaser is embodied in this contract of sale and the subscription (or application) therefor, taken together, which cannot be varied except in writing by one of the following executive officers of the society at its home office in New York, namely, the president, one of the vice-presidents, the secretary, the assistant secretary, the comptroller, the actuary, the assistant actuary, the treasurer, the auditor, the recorder, the registrar or the assistant registrar."

On November 26, 1902, a change was made in the contract, whereby the premiums, instead of being payable annually, were made payable quarterly in the sum of $210.60 on the 27th days of November, February, May, and August. The receipts of the society for instalments were sent from the headquarters of the society to the agents of the society prior to the date when due. Notices were sent at the same time to the insured, giving the amount of the instalment or premium, the date when due, and the person to whom payment could be made. In the event of an omission to pay when due, the agent authorized to receive payment sent a

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notice of the nonpayment to the insured and urged a reinstatement by payment. At times a collector would take out the receipts for overdue instalments, and, upon seeing the insured, assuring himself by inspection or questioning that the insured was in good health, and upon receiving the payment would turn over the receipt. If the collector was not trusted, or if he was doubtful of the risk, he made report to the officer authorized to receive payment, and such further steps were then taken as this officer deemed necessary to assure him of the health of the insured. The receipt was then sent to the insured by the officer authorized to receive the payment. It does not appear how long the department agent might retain the receipts after the instalment became due and remained unpaid before he was expected to return them to the home office.

In the instant case the dates when the instalments were due, the dates of the expiration of the thirty days of grace, and the dates of payment, as taken from the books of the agency of the society, were as follows:

Quarterly payments.	Due.	30 days of grace expired.	Paid.
1st.	Nov. 27, 1902.	Dec. 27, 1902.	Jan. 13, 1903.
2d.	Feb. 27, 1903.	Mar. 29, 1903.	Mar. 30, 1903.
3d.	May 27, 1903.	June 28, 1903. (June 26, 1903.)	June 30, 1903.
4th.	Aug. 27, 1903.	Sept. 27, 1903. (Sept. 26, 1903.)	Oct. 1, 1903.
5th.	Nov. 27, 1903.	Dec. 27, 1903.	Dec. 31, 1903.
6th.	Feb. 27, 1904.	Mar. 28, 1904.	Mar. 28, 1904.
7th.	May 27, 1904.	June 26, 1904.	June 28, 1904.
8th.	Aug. 27, 1904.	Sept. 26, 1904.	Sept. 30, 1904.
9th.	Nov. 27, 1904.	Dec. 27, 1904.	Jan. 3, 1905.
10th.	Feb. 27, 1905.	Mar. 29, 1905.	Mar. 30, 1905.
11th.	May 27, 1905.	June 26, 1905.	

The amounts which were paid on March 30, 1903, and on October 1, 1903, were received by mail, according to the books of the Milwaukee agency. There is no record of any statement that his health was good at the time of payment of an overdue instalment subscribed by the insured. With the exception of the instalments which were paid by mail

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and the last one or two instalments, they were collected from the insured by a collector of the society now deceased. The collector of the last one or two payments took the receipts with him, called upon the insured, and upon receiving a check for the amount of the instalment handed the receipt to the insured. He testifies that he observed him, but asked him no questions as to his health. The general agent of the society, to whom the receipts were sent and to whom the insured were notified by the society that they might make payments, testified that he acted in the matter of a reinstatement upon the verbal report of the collector to him. No records were produced by the society showing any record of any reinstatement of Mr. Goes upon his formal application and upon his furnishing proof of good health. Nor is there evidence that the necessary formal steps to a reinstatement were insisted upon.

The insured took his own life on the morning of June 29, 1905. At about 12:30 in the afternoon a tender of the instalment due on June 26, 1905, was made on behalf of the deceased's estate. The offer was rejected. Plaintiff, as administrator of the estate of the deceased, brings this action to recover the amount of the insurance. It is averred that the acts of the society through its general agent resulted in a modification of the contract, whereby the part of the contract providing that the contract should lapse upon the nonpayment of an instalment was so modified that a strict performance as to payment of instalments was waived. The defendant claims that the contract lapsed under the conditions of the contract, and that it is liable only for the amount of insurance which became automatically due on the contract by the laws of the state of New York.

At the conclusion of the evidence, which established the facts stated above, the court directed a verdict for the plaintiff for the full amount of the insurance and awarded judgment accordingly. This is an appeal from the judgment.

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For the appellant there was a brief by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *C. F. Fawsett.* To the point that the company is not estopped from insisting upon the terms of the contract they cited, among other cases, *Ewald v. N. W. Mut. L. Ins. Co.* 60 Wis. 431; *Schmidt v. Modern Woodmen,* 84 Wis. 101, 105; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308; *Modern Woodmen v. Tevis,* 117 Fed. 369; *Conway v. Phœnix Mut. L. Ins. Co.* 140 N. Y. 79; *Thompson v. Ins. Co.* 104 U. S. 252; 2 Bac. Abr. § 431; *Crossman v. Mass. Ben. Asso.* 143 Mass. 435, 436; *Nat. Mut. Ben. Asso. v. Miller,* 85 Ky. 88; *Thompson v. Fidelity Mut. L. Ins. Co.* 116 Tenn. 557, 92 S. W. 1098; *Johnson v. Continental Ins. Co.* (Tenn.) 107 S. W. 688, 692.

Louis G. Bohmrich, for the respondent.

SIEBECKER, J. The litigated question is whether or not the acts and conduct of the defendant society, as to payment of the lapsed instalments due from the deceased, Goes, were such as to furnish him a reasonable and sufficient ground to believe that the society would not exact strict performance of the contract respecting the payments of instalments, and that a modified performance of this stipulation would be accepted as a compliance with the terms of the agreement. The defendant alleges a forfeiture of the contract by the failure of the insured to pay the quarterly premium at the time stipulated in the contract. As set forth in the foregoing statement of facts, the insured was in default in payment of all of the quarterly premiums due under the contract from November 27, 1902, to the date of his death, June 29, 1905, excepting the instalment paid March 30, 1904, the last day of grace. Payment was made by the insured and accepted by the society after such default on all of them. The trial court held that this course of dealing of the parties, respecting payment and acceptance of all such premiums after de-

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fault under the terms of the contract, showed a waiver of the strict stipulation of the contract respecting forfeiture for default in payment of the premiums and established a modification of such stipulation in accord with this course and custom of dealing, and that the society is now estopped from insisting on forfeiture under the strict terms of the contract. It is a recognized rule of law, under the decisions of this court,

"that where, by failure of some exact performance, a forfeiture is imposed on one party by the strict terms of an agreement, conduct of the other sufficient to induce a belief that such strict performance is not insisted on, but that a modified performance is satisfactory and will be accepted as equivalent, will justify a conclusion that the parties have assented to a modification of the original terms, and that their minds have met upon the new understanding that a different mode of performance shall have the same effect, or, as it is often expressed, that the obligee has waived strict performance." *Reisz v. Supreme Council A. L. of H.* 103 Wis. 427, 79 N. W. 430, and cases there cited; *Knoebel v. North Am. Acc. Ins. Co.* 135 Wis. 424, 115 N. W. 1094.

It is not disputed that the representatives of the society had full knowledge of the fact that the deceased had failed to pay at the time called for by the terms of the policy, and that a forfeiture of it had been incurred if its terms were enforced. Nor is there dispute as to the authority of Whitlock, the agent, to act for the society in collecting the premiums from the deceased and to execute renewals by delivering them to the deceased. The evidence established that the quarterly instalments due respectively on the 27th of February, May, August, and November in each year, with thirty days of grace for paying them with interest, were not, excepting one, paid within this period, but were in fact paid from one to sixteen days thereafter. It does not appear that the insured, after these lapses, took any steps to be reinstated under the fourth condition attached to the contract, provid-

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ing that, if the contract should lapse for nonpayment of any instalment, reinstatement of it might be had if the purchaser furnished satisfactory evidence of good health to the defendant and paid all arrears of indebtedness with interest from the time of such lapse. The facts are undisputed that the society, after default in payment of these instalments according to the strict terms of the contract, accepted payment of them without demanding of the insured that he furnish evidence of his good health. The unvarying course of conduct, it appears, was to send a representative to the insured, who, if satisfied from observation or otherwise that the insured was in good health, demanded payment of the defaulted instalment and then reported to the person authorized to receive payment and to deliver renewals. This representative thereupon accepted payment of the defaulted instalment and delivered the renewal to the assured, or, if the renewal had been delivered by the person sent to collect the unpaid instalment, he accepted payment on the report made to him. There is nothing in this course of dealing suggesting that the contract had been terminated and that there had been a reinstatement after a lapse in the manner specified in the contract. It indicates an understanding that this transaction constituted compliance with and satisfaction of the terms of the contract for the payment of instalments and that no default existed. In the light of such conduct and dealing between the company and the deceased throughout the period shown, it is manifest that the insured had the right to believe that strict performance had been waived, and that he made, and the society received, these defaulted payments on the understanding that the contract had not lapsed and that such modified performance would be accepted by the company in lieu of the obligations imposed by its strict terms.

The force of the claim that the defendant in its correspondence and written notices insisted that no stipulation had been waived or modified is fully overcome by its acts and

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conduct, which were naturally calculated to lead any reasonably prudent person to infer that it treated the contract as still in force after such defaults, which under its strict terms constituted a forfeiture and nullification of the obligation. We are persuaded that the deceased and the defendant did not treat the contract as terminated before the insured died, and that the defendant is therefore estopped from insisting on a forfeiture on account of the lapse in the payment of the last instalment, three days before the insured's death. Under such circumstances the personal representative is entitled to enforce the contract against the society. *Reisz v. Supreme Council A. L. of H.* 103 Wis. 427, 79 N. W. 430; 3 Cooley, Briefs on Insurance, 2707.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

DEXTER, Respondent, vs. WITTE and others, imp., Appellants.

January 28—February 16, 1909.

(1) ***Pleading: Amendment.*** (2, 3) ***Wills: When deed held testamentary: Delivery.***

1. In an action to set aside a trust deed on the ground of mental incompetency of the grantor, there was no error in allowing the complaint to be amended at the trial so as to allege that the deed was never delivered.
2. An instrument in the form of a deed, plain and unambiguous on its face, conveying a present interest in land and unexplained by any contemporaneous writing of a testamentary character, cannot be held to be a will.
3. Thus, an instrument in the form of a deed, conveying land in trust, with power to sell, lease, or mortgage the same, and directing distribution of the proceeds among certain descend-

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ants of the grantor, which had been intrusted by the grantor, during her last illness, to a third person, to be kept by him with other papers for her, but with instructions to deliver it to the grantee in case she did not recover from such illness, and which had, after her death, been handed by said third person to the grantee, is *held* not to have been delivered so as to be valid as a deed, and not to be a will.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This action was brought to set aside a trust deed executed by Mary Jane Dexter shortly before her death, conveying certain real estate in Milwaukee county to the defendant *Robert Stewart Witte* in trust for certain purposes named in the deed. The plaintiff is a son of Mary Jane Dexter, and defendant *Addie Dexter Witte* is her daughter and the wife of *Robert Stewart Witte,* trustee, and the other defendants are children of plaintiff and of the defendants *Robert Stewart Witte* and *Addie Dexter Witte.*

The complaint alleges, in substance, that the said Mary Jane Dexter on and prior to the 10th day of February, 1904, was of unsound mind and memory, incapable of managing her own affairs, mentally incompetent to take care of or dispose of her property, and capable of being easily influenced by other persons; that she was induced to sign a certain paper purporting to be the deed in question at the instigation of defendant *Robert Stewart Witte* in the interest of his wife and their children; that at the time of signing said paper Mary Jane Dexter was not informed of the contents thereof and never acknowledged the same; that on the 17th day of February, 1904, said Mary Jane Dexter died intestate in the county of Milwaukee, without having made any last will and testament, leaving her surviving as her only children and sole heirs at law the plaintiff and the defendant *Addie Dexter Witte,* and that they ever since have been and now are seised in fee of the premises described in the trust deed; that the defendant *Robert Stewart Witte* caused

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said deed to be recorded in the office of the register of deeds prior to the commencement of this action; that he is in possession of the real estate described therein, and claims that, by virtue of said alleged deed, he is seised of said premises as trustee to the uses set forth in said instrument; and that the other defendants severally claim the several rights, estates, and interests to which they are entitled upon the face of the deed. The prayer is that said alleged deed may be declared to be null and the same and the record thereof set aside and canceled, and that the title to said real estate may be adjudged to be in plaintiff and the defendant *Addie Dexter Witte* as tenants in common.

The deed conveys the property referred to to the defendant *Robert Stewart Witte* in trust for certain purposes named therein with power to sell, convey, lease, or mortgage the same, and out of the proceeds the trustee is directed to pay certain sums to the plaintiff's children on their arriving, respectively, at the age of twenty-one years, with alternative provision in favor of the survivors, if any of them should die before reaching that age, and, if none of them should live to that age, then the money to be paid to their father, the balance of the property to be paid to the children of defendant *Addie Dexter Witte,* each to receive his portion on reaching the age of twenty-one years, with alternative provision in favor of the survivor, if either should die before reaching that age, and if none of them should live to that age then the whole balance to be paid to their mother; under certain circumstances the property to be conveyed to *Mrs. Witte's* children, or, upon their death, to her, subject to the payment of the sums directed to be paid to the plaintiff's children. The deed purported to have been duly signed, sealed, and delivered in the presence of two witnesses, and was duly acknowledged on the 10th day of February, 1904.

Answers were put in admitting the making of the deed and that it had been recorded by the defendant *Robert*

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Stewart Witte in the office of the register of deeds for Milwaukee county; that Mary Jane Dexter died intestate without having made any last will and testament, and leaving her surviving as her only children and sole heirs at law the plaintiff and defendant *Addie Dexter Witte;* that defendant *Robert Stewart Witte* was in possession of the real estate, claiming to be seised of the premises by virtue of said deed as trustee to the uses set forth in said instrument; and that the other defendants severally claimed the interest which said deed upon its face vested in them or in said *Robert Stewart Witte* as trustee. The answers denied that Mary Jane Dexter was of unsound mind or incapable of managing her affairs or was induced to sign the deed by any one, and alleged that the same was her own free and voluntary act and deed; and denied that the said Mary Jane Dexter was not informed of the contents of the deed, or that she never acknowledged it or gave her consent thereto.

On the trial the plaintiff asked leave to amend his complaint by inserting that the writing purporting to be a deed of conveyance was not the deed of Mary Jane Dexter, and that said deed was never delivered by Mary Jane Dexter to the grantee named therein. This amendment was allowed under objection. The main question litigated on the trial was the delivery of the deed. The court, among other things, found:

"(3) That on the 10th day of February, A. D. 1904, the said Mary Jane Dexter was sick, and that on that day she signed a deed of conveyance of the premises described in the first finding of fact, wherein the defendant *Robert Stewart Witte* was named as grantee in trust for the other defendants and plaintiff under the provisions and contingencies therein expressed, and that said Mary Jane Dexter thereupon intrusted said deed to the hands of one G. H. Fowler, to be kept by him with other papers for her, but with instructions to deliver the deed to said *Robert Stewart Witte* in case she did not recover from her sickness; that she re-

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tained control of said deed during her lifetime, but did not further act with reference to the same during her lifetime, and said deed remained in the possession of said Fowler until after her death.

"(4) That said Mary Jane Dexter did not recover from her said sickness, but died intestate on February 17, 1904, leaving her surviving as her only children and sole heirs at law the plaintiff and the defendant *Addie Dexter Witte.*"

And as conclusions of law found:

"(1) That there was not such a delivery of said deed by said Mary Jane Dexter as to pass title to the premises therein described.

"(2) That plaintiff is entitled to have said deed declared null and void and set aside and canceled of record, and to have the title to said premises adjudged to be in the plaintiff and the defendant *Addie Dexter Witte* as tenants in common, with the costs of this action."

After trial and decision of the court, counsel for appellants asked leave to amend the answer so as to withdraw the allegation to the effect that Mary Jane Dexter died intestate, and by alleging that, if the conveyance in question was not valid as a deed by reason of failure to deliver it, the same was the last will and testament of Mary Jane Dexter and duly executed by her as such, which was denied. Judgment was entered declaring the deed null and void and adjudging that the title to the premises described therein was in the plaintiff, *Frances C. L. Dexter,* and the defendant *Addie Dexter Witte,* as tenants in common. The defendants *Robert Stewart Witte, Addie Dexter Witte, Gladys J. Witte,* and *Dexter Hathaway Witte* appeal from said judgment.

For the appellants there was a brief by *Winkler, Flanders, Bottum & Fawsett,* attorneys for *Robert Stewart Witte* and *Addie Dexter Witte,* by *R. Sinclair Witte,* guardian *ad litem* of *Gladys J. Witte* and *Dexter Hathaway Witte,* and by *James G. Flanders,* of counsel; a reply brief signed by *Winkler, Flanders, Bottum & Fawsett,* attorneys, and *James G. Flanders,* of counsel; and oral argument by *C. E. Monroe.*

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For the respondent there was a brief by *Nath. Pereles & Sons,* attorneys, and *Charles S. Carter,* of counsel, and oral argument by *Mr. Carter.*

KERWIN, J. It is established without dispute that the deed in question was never delivered, hence never had vitality as a deed. No error was committed in allowing the amendment to the complaint setting up nondelivery of the deed. The main contention of the appellants is that, although the deed was void for want of delivery, it was valid as a will, and that they should have been permitted to amend their answer so as to set up the fact that the instrument was a will, and be protected by the judgment in their right to have the instrument probated. If the instrument was not testamentary in character, but in fact a deed, the denial of appellants' motion to amend becomes immaterial and could under no circumstances work prejudice. We are cited to a great many authorities by counsel on both sides and have examined them with care. Some of those cited by appellants are where the instruments were upon their face testamentary and showed that no interest was to pass until after the death of the maker, while in others the main point of controversy was whether any interest did in fact vest before death of the grantor, and whether a deed could take effect *in futuro.* There seems to be much apparent, if not real, confusion in the authorities as to when certain instruments are deeds or wills. In *Sharp v. Hall,* 86 Ala. 110, 112, 5 South. 497, the court says:

"There are few, if any, questions less clearly defined in the law books than an intelligible, uniform test by which to determine when a given paper is a deed and when it is a will. Deeds, once executed, are irrevocable, unless such power is reserved in the instrument. Wills are always revocable so long as the testator lives and retains testamentary capacity."

In all the cases which we have examined the instruments held to be wills bore upon their face, or together with writ

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ings which were part of them, some evidence of testamentary character, and the sufficiency of such evidence coupled with the formality of execution so as to comply with statutory requirements for the execution of wills were the controverted questions. *Sharp v. Hall, supra; Wareham v. Sellers,* 9 Gill & J. 98; *Smith v. Holden,* 58 Kan. 535, 50 Pac. 447; *Burlington University v. Barrett,* 22 Iowa, 60; *Estate of Longer,* 108 Iowa, 34, 78 N. W. 834; *McCourt v. Peppard,* 126 Wis. 326, 105 N. W. 809; *Lautenshlager v. Lautenshlager,* 80 Mich. 285, 45 N. W. 147; *Sartor v. Sartor,* 39 Miss. 760; *Nichols v. Chandler,* 55 Ga. 369; *Lauck v. Logan,* 45 W. Va. 251, 31 S. E. 986; *Bromley v. Mitchell,* 155 Mass. 509, 30 N. E. 83; *Estate of Kisecker,* 190 Pa. St. 476, 42 Atl. 886. The foregoing cases show the character of the instruments which have been held to be testamentary and entitled to probate as wills. We have been cited to no case, and have found none, where a deed plain and unambiguous on its face conveying a present interest and unexplained by contemporaneous writing of a testamentary character was held to be a will, while on the other hand we find authority directly in point to the contrary. *Clay v. Layton,* 134 Mich. 317, 96 N. W. 458; *Dodson v. Dodson,* 142 Mich. 586, 105 N. W. 1110; *Estate of Skerrett,* 67 Cal. 585, 8 Pac. 181. We have also examined a great number of cases which bear more or less upon the question as corroborative of the foregoing, some of which we call attention to. *Mann v. Ex'rs of Mann,* 1 Johns. Ch. 231; *Cates v. Cates,* 135 Ind. 272, 34 N. E. 957; *Wilson v. Carrico,* 140 Ind. 533, 40 N. E. 50; *White v. Hopkins,* 80 Ga. 154, 4 S. E. 863; *Bunch v. Nicks,* 50 Ark. 367, 7 S. W. 563; *Shackelton v. Sebree,* 86 Ill. 616; *Wyman v. Brown,* 50 Me. 139; *Patterson v. English,* 71 Pa. St. 454; *Turner v. Scott,* 51 Pa. St. 126; *Nichols v. Emery,* 109 Cal. 323, 41 Pac. 1089; *Estate of Ogle,* 97 Wis. 56, 72 N. W. 389; *Whitmore v. Hay,* 85 Wis. 240, 55 N. W. 708. *Clay v. Layton, supra,* is directly in point. There, as here,

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the instrument was in form a deed conveying a present interest and containing on its face nothing of a testamentary character. The maker retained control of the instrument during his life, but left instructions for delivery to the grantee named after his death, and the instrument was held a deed and not a will. In discussing the subject in *Clay v. Layton, supra,* the court lays down the principles governing such cases, namely:

"(1) Those in which the testamentary intent is clearly deducible from the writing.

"(2) Those where the instrument is ambiguous, or of doubtful meaning.

"(3) Those where there is nothing to indicate a testamentary intent, but, on the contrary, the instrument is in terms plainly a deed."

The court held that in the first class there was no difficulty in holding the instrument a will; in the second that it might be interpreted in the light of the circumstances; and in the third that the instrument could not be contradicted and shown to be a will. The deceased left in a drawer which he controlled up to the time of his death a written instrument in the form of a deed with instructions to deliver it in connection with other papers upon his death, and stating that he left the matters in that form to avoid probate. The court said:

"These papers plainly provide in terms for a present transfer of property, and to show that a different intention existed would be to contradict them, and this cannot be done. We have examined many authorities where the question involved was whether papers in form deeds were testamentary in character, and it is a significant fact that not one has been found which supports the complainant's contention. In nearly every instance the question is solved from the writing itself, or, if not, the construction adopted is not contradictory to its provisions which are open to two interpretations. We have had difficulty in finding a case in which the exact point before us is raised, but it seems manifest that the same rule

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that forbids the contradiction of an established will should forbid the contradiction of the same instrument as a means of establishing it as a will, when its terms plainly show it to be a deed conveying a present interest. It is only when the writing is of doubtful import that interpretation by the aid of extrinsic evidence becomes necessary, and in such case interpretation, not contradiction, is permissible."

We think the doctrine laid down in the foregoing case is sound in principle and in harmony with the great weight of authority. We hold that the deed in question could not be probated as a will; hence the judgment below was right and must be affirmed.

By the Court.—The judgment is affirmed.

MARLING, Appellant, vs. JONES and another, Respondents.

January 28—February 16, 1909.

Bills and notes: Accommodation paper: Consideration: Transfer after maturity: Rights of holder: Mortgages: Assignment: Failure to record: Payments: Rights of subsequent purchaser in good faith.

1. No consideration moving to the accommodation maker is necessary to uphold an accommodation note, the consideration supporting his promise being that parted with by the person taking the note and received by the person accommodated.
2. The maker of an accommodation note cannot defend against it on the ground that the holder other than the person accommodated, whether indorsee or transferee for value, knew before and when he took the note that the accommodation maker received no consideration.
3. The agency of the party accommodated to negotiate an accommodation note and raise money thereon does not, in the absence of express agreement, expire at the maturity of the note; and the mere fact that the transfer to a holder for value was made after the note became due does not permit the accommodation maker to defeat recovery at the suit of such holder

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merely upon the ground that there was no consideration moving to the accommodation maker.

4. The indorsee of a negotiable note and mortgage may safely hold possession thereof without recording his assignment, and, nothing else appearing, he will be protected against payments by the debtor to the original mortgagee who has not possession of the note and mortgage.

5. But it is otherwise as against one who purchases the mortgaged land in good faith and for a valuable consideration without notice of the assignment, and who receives from or through the vendor, at the time of his purchase and as part of the same transaction, a conveyance of the land and a satisfaction of the mortgage by the apparent owner of record. Against such a purchaser who places his deed and satisfaction of mortgage on record before the assignment of the mortgage is recorded, the assignee is estopped to assert his mortgage lien.

6. The mere fact that the deed delivered to such a purchaser simultaneously with the satisfaction of mortgage and as part of the transaction excepted the mortgage from the covenant against incumbrances, did not put him in the position of a debtor paying the mortgage debt.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Modified and affirmed.*

The appeal is from a judgment dismissing the plaintiff's complaint in an action to foreclose a mortgage.

For the appellant there was a brief by *Goff, Hayes & Hannan,* and oral argument by *Guy D. Goff.* Among other authorities, they cited *Cooper v. Jackson,* 4 Wis. 537; *Prutsman v. Baker,* 30 Wis. 644; Wiltsie, Mortgage Foreclosures, § 395; *Reichert v. Neuser,* 93 Wis. 513, 67 N. W. 939; *Cleveland v. Southard,* 25 Wis. 479; 3 Pom. Eq. Jur. § 1205; *Winkelmann v. Brickert,* 102 Wis. 50, 78 N. W. 164; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423; *Marling v. Nommensen,* 127 Wis. 363, 106 N. W. 844; *Nix v. Wiswell,* 84 Wis. 334, 54 N. W. 620.

C. E. Estabrook, for the respondent *Jones,* cited *Remington v. Detroit D. Mfg. Co.* 101 Wis. 307, 309, 77 N. W. 178; *Breitengross v. Farr,* 100 Wis. 215, 216; *Cawley v.*

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Kelley, 60 Wis. 315, 319; *Mason v. Beach,* 55 Wis. 607, 612; 1 Jones, Mortg. § 859; *Fred Miller B. Co. v. Manasse,* 99 Wis. 99, 102; *Central Bank v. Copeland,* 18 Md. 305, 81 Am. Dec. 597; *Croft v. Bunster,* 9 Wis. 503; *Owen v. Evans,* 134 N. Y. 514, 31 N. E. 999; *Wilson v. Ott,* 173 Pa. St. 253, 34 Atl. 23, 51 Am. St. Rep. 767; *Foster v. McGuire,* 96 Ga. 447, 23 S. E. 398; *McKenna v. Kirkwood,* 50 Mich. 544; *Bacon v. Harris,* 15 R. I. 599, 10 Atl. 647; 27 Cyc. 1320, subd. 3, and cases cited; 35 Am. Dig. (Cent. ed.) § 1212, col. 1946.

For the respondent *Lindsay* there was a brief by *M. H. Brand,* attorney, and *Frank T. Boesel,* of counsel, and oral argument by *Mr. Boesel.* They cited, besides other cases, sec. 2241, Stats. (1898); 1 Am. & Eng. Ency. of Law (2d ed.) 364; *Hodge v. Wallace,* 129 Wis. 84, 108 N. W. 212; secs. 1676—22, 1675—54, Stats. (Supp. 1906); *Butler v. Bank of Mazeppa,* 94 Wis. 351, 68 N. W. 998; *Griswold v. Nichols,* 117 Wis. 267, 94 N. W. 33; *Kellogg v. Fancher,* 23 Wis. 21; *Grand Rapids Nat. Bank v. Ford,* 143 Mich. 402, 107 N. W. 76; *Marling v. Nommensen,* 127 Wis. 363, 369, 106 N. W. 844; *Friend v. Yahr,* 126 Wis. 291, 301, 104 N. W. 997; *Bautz v. Adams,* 131 Wis. 152, 111 N. W. 69; *Bennett v. Keehn,* 67 Wis. 154, 29 N. W. 207, 30 N. W. 112.

TIMLIN, J. The findings establish that on September 21, 1898, *Everett H. Jones* executed his promissory note for $2,000 payable two years after date to the order of Henry Herman and bearing interest, and at the same time and as security for the payment of the note executed a mortgage to Henry Herman in due form upon lots 11, 12, 13, 14, 15, 16, 17, 18, and 19 in block No. 1, Lindsay's subdivision in the Seventeenth ward of the city of Milwaukee, which mortgage was recorded on September 22, 1898, in the proper office. *Jones* executed and delivered this note and mortgage

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to Herman with the understanding that Herman would negotiate the same and raise money thereon, but *Jones* received no consideration and the note and mortgage were executed by him merely for the accommodation of Henry Herman. June 2, 1901, *Jones* conveyed the mortgaged premises subject to this mortgage of $2,000 to one Raymond, the confidential agent for Henry Herman, who was acting for the latter in all the transactions herein mentioned. This deed was recorded February 11, 1902, in the proper office. *Jones* never had or claimed any real interest in or to the mortgaged property. April 2, 1902, Henry Herman assigned to the plaintiff's assignor, under whom she claims, and after it was past due, the note and mortgage aforesaid, and indorsed the note, and delivered the instruments so assigned and indorsed to plaintiff's assignor as collateral security to a promissory note of $2,000 then executed for value by Henry Herman to plaintiff's assignor and bearing even date with said assignment. This assignment was not recorded until April 16, 1903. October 16, 1902, Henry Herman delivered to the defendant *Lindsay* a warranty deed of the mortgaged premises running from Raymond to *Lindsay*, containing the statement in the covenant against incumbrances that the mortgaged premises were free and clear of all incumbrances whatever, except one mortgage for the sum of $2,000. This deed was dated and acknowledged February 28, 1902, and recorded in the proper office October 17, 1902. On October 16, 1902, at the time of the delivery of the deed to *Lindsay*, Herman also delivered to *Lindsay* a satisfaction piece or release in writing of the mortgage first mentioned, which release is dated October 16, 1902, and was recorded October 17, 1902, in the proper office. The consideration of this conveyance of land and satisfaction of mortgage to the defendant *Lindsay* was that *Lindsay* credited Henry Herman with a payment of $2,475 on a note of $4,500 dated November 27, 1900, belonging to *Lindsay* upon which Herman was

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liable as indorser. *Lindsay* took possession of the premises in question immediately after the transfer and paid the taxes thereon since said date. The transaction between Herman and *Lindsay* was at one and the same time a purchase of the lots from Herman by *Lindsay* for $2,475 and a payment of the mortgage of $2,000 thereon by *Lindsay,* both incidents being part of the same transaction. *Lindsay* had no knowledge or information of any kind of any claim by the plaintiff's assignor to the premises. He acted in good faith and relied upon the record title to the premises with respect to the title as well as to the mortgage; but he did not require the production of the note and mortgage in question and the same were not produced. There is due and owing to the plaintiff upon the note in question $2,575, and, except as hereinbefore stated, no part has ever been paid.

In addition to these findings of fact the undisputed evidence showed that the lots in question were, at the instance and request of Herman, conveyed by the National Realty Company to *Jones* immediately prior to the execution of the note and mortgage in question by *Jones* and for the purpose of having *Jones* execute the mortgage thereon as an accommodation to Herman.

As conclusions of law from the foregoing facts the court below found that the note and mortgage executed by the defendant *Jones* are void for want of consideration, but that the defendant *Lindsay* is estopped to set up this invalidity because *Lindsay* purchased the mortgaged premises subject to the mortgage; that the plaintiff's assignor and the defendant *Lindsay* were negligent in their dealings with Henry Herman in the matters herein involved—plaintiff's assignor in not recording his assignment after the same was delivered to him, and *Lindsay* in not demanding the note and mortgage in question at the time the release of the mortgage and warranty deed to the lots were delivered to him; that the plaintiff cannot come into equity asking relief because his negligence

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was prior to and greater than that of the defendant *Lindsay;* that the defendants, *Jones* and *Lindsay,* are entitled to judgment dismissing the plaintiff's complaint with costs.

The reasons given in the foregoing conclusions of law do not meet the approval of this court, but we review results, not reasons assigned.

Was the action properly dismissed as to *Jones?* No consideration moving to the accommodation maker is necessary to uphold an accommodation note. The very name of the paper suggests this. The consideration in such case which supports the promise of the accommodation maker is that parted with by the person taking the accommodation note and received by the person accommodated. Nor is it any defense by the maker of an accommodation note that the taker other than the person accommodated, whether indorsee or transferee for value, knew before and when he took the note that the accommodation maker received no consideration. This would be merely showing that such taker, indorsee, or transferee knew that it was an accommodation note. If this were sufficient to defeat the note there could be no such thing as accommodation paper, except in cases of ignorance of this fact on the part of the taker, indorsee, or transferee, and this would be contrary to common experience, and avoid many of the daily transactions in banking and other branches of business. Sec. 1675—55, Stats. (Supp. 1906). But the accommodation note in question was transferred by the party accommodated, namely, the payee therein, after it became due. Does this circumstance permit the accommodation maker to avoid the note on the ground that he received no consideration? If the effect of a transfer after due is merely to leave the transferee subject to notice or knowledge of the true circumstances attending the execution of the note in question, and for this reason subject him to defenses, then, as actual knowledge that the note was accommodation paper would be no defense by the accommodation maker as against the trans-

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feree for value from the party accommodated, it would seem that it could make no difference in the liability of the accommodation maker upon this ground whether the note was transferred before or after due. Aside from this imputed notice or knowledge, or actual notice or knowledge, it is not true that the taker for value from the party accommodated stands in the shoes of the latter. The difference between them is that one has parted with value for the note and the other has not. In neither case has the maker received a consideration moving to him. So that between the party accommodated and the accommodation maker there is no consideration parted with or received by either, while between the transferee for value and the accommodation maker there is a consideration moving from the former at the instance of the latter sufficient to support the contract. There is considerable conflict among the decisions on this point, and those text-writers who profess to have made a thorough examination of the cases seem to incline to the belief that the weight of authority upholds the view that the transferee of accommodation paper after due may enforce the same against the accommodation maker. Joyce, Defenses to Comm. Paper, § 282 (1907); 1 Dan. Neg. Inst. (5th ed.) § 726 (1903); 2 Randolph, Comm. Paper (2d ed.) § 677 (1899); Story, Prom. Notes (7th ed.) § 194 (1878); 2 Parsons, Notes & Bills, p. 29 (1865); *Mersick v. Aderman,* 77 Conn. 634, 60 Atl. 109; *Black v. Tarbell,* 89 Wis. 390, 61 N. W. 1106; 1 Am. & Eng. Ency. of Law (2d ed.) 364.

The uniform Negotiable Instrument Law (secs. 1675 to 1684—7, Stats.: Supp. 1906) enacted by the legislature of this state, and in like manner adopted by thirty-four states of the Union and by Congress for the District of Columbia in the effort to bring about more uniformity of decision regarding these instruments of commerce, appears to distinguish between a holder for value and a holder in due course. Brannan, Neg. Inst. Law (1908); Bunker, Neg. Inst. Law

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(1905). Sec. 1675—55, Stats. (Supp. 1906), defines who is an accommodation party, and provides that such party is liable on an instrument to a holder for value notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. Sec. 1675, Stats. (Supp. 1906), defines "holder" to mean the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof, and defines "value" to mean a valuable consideration. On the other hand a holder in due course is defined in sec. 1676—22, Stats. (Supp. 1906), to be one who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder before it was overdue and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it; (5) that he took it in the usual course of business.

In the hands of a holder otherwise than in due course such note is subject to the same defenses as if the notes were not negotiable. Sec. 1676—28, Stats. (Supp. 1906). A negotiable instrument is discharged by the payment in due course by the party accommodated. It is not discharged by payment by a party secondarily liable thereon, but remits such party to his rights against him primarily liable (sec. 1679—2, Stats.: Supp. 1906) except where it is made for accommodation and paid by the party accommodated (Id.) On the other hand there are the cases of *Chester v. Dorr,* 41 N. Y. 279; *Peale v. Addicks,* 174 Pa. St. 543, 34 Atl. 203; *Bacon v. Harris,* 15 R. I. 599, 10 Atl. 647; *Battle v. Weems,* 44 Ala. 105; and *Simons v. Morris,* 53 Mich. 155, 18 N. W. 625. See, however, in Alabama the later case of *Connerly v. Planters' & M. Ins. Co.* 66 Ala. 432; in Michigan the later case of *Warder, B. & G. Co. v. Gibbs,* 92 Mich. 29, 52 N. W. 73.

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No doubt there exists a class of defenses in favor of the accommodation maker of negotiable paper which may not be urged in cases where the note is fair on its face and negotiated in due course before due to a purchaser for value without notice or knowledge of any infirmity, but which might be urged in favor of the accommodation maker if the note were overdue when negotiated. But the fact that the accommodation maker received no consideration is not one of these defenses so long as the note was negotiated by his express or implied authority. The fact is here established that this note was in its inception accommodation paper. *Jones* made to Herman no express restriction upon its use for that purpose. We do not overlook the testimony of Brand with reference to conversations between him and Herman not in behalf of *Jones,* which the court below from its findings must have rejected as incredible. We approve this rejection. The testimony is overborne by the circumstantial evidence. It is a question upon which the precedents are at some variance whether or not the agency of the party accommodated to use the accommodation paper to raise money thereon (no express agreement appearing) expires with the maturity of the paper. The greater number of courts seem to favor the view that the agency to negotiate an accommodation paper and raise money thereon is not so limited. See citations *supra.*

The courts of this state are not yet committed upon the question presented, and it seems more in harmony with the uniform Negotiable Instrument Law and with the weight of judicial authority to hold, as we do, that the mere fact that the accommodation note was transferred by the party accommodated after due to a holder for value does not permit the accommodation maker to defeat recovery at the suit of the holder for value merely upon the ground that the note was an accommodation note and without consideration moving to the accommodation maker. This necessitates a modification of

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the judgment of the court below so as to permit the appellant to take judgment against the accommodation maker, *Jones*.

Upon the question of the right of the appellant to foreclose the mortgage against the mortgaged premises different questions arise. The findings of the court below, based on sufficient evidence, establish that the transaction between *Lindsay* and Herman which resulted in *Lindsay* receiving from Raymond, at Herman's request, a warranty deed of the mortgaged premises, with covenant against incumbrances except the mortgage in question, and in receiving from Herman a satisfaction of the mortgage in question, was a single transaction—at one and the same time a purchase of the lots by Herman from *Lindsay*, and a payment of the mortgage of $2,000 thereon in consideration of $2,475 of pre-existing debt then and there and by that transaction paid and discharged. *Griswold v. Nichols*, 117 Wis. 267, 94 N. W. 33.

Within the rule of *Marling v. Nommensen*, 127 Wis. 363, 106 N. W. 844; *Friend v. Yahr*, 126 Wis. 291, 104 N. W. 997, and other cases, *Lindsay* was a purchaser of the real property. The fact that the deed delivered to him simultaneously with the satisfaction of mortgage and as part of the transaction excepted this mortgage from the covenant against incumbrances was not sufficient to put *Lindsay* in the position of a debtor paying a mortgage debt. It, with the abstract, merely charged him with notice of the existence of the mortgage and the name of the mortgagee from whom he procured the satisfaction piece. His rights must be determined by the rule of the cases last cited rather than by the rule of *Bartel v. Brown*, 104 Wis. 493, 80 N. W. 801. He is entitled to the protection which the statute gives to purchasers without notice, because it is found that he purchased in good faith for a valuable consideration without knowledge of the outstanding assignment of the mortgage to plaintiff's assignor, and first placed his deed and satisfaction of mortgage

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upon record, and as against such purchaser the assignee of the mortgage who fails to record his assignment is estopped to assert his mortgage lien. *Friend v. Yahr, supra.* It is not a question of comparative negligence between plaintiff's assignor and *Lindsay.* The indorsee of a negotiable note and mortgage may safely hold possession of that mortgage and note without recording his assignment, and, nothing else appearing, he will be protected against payments by the debtor to the original mortgagee who has not possession of the note and mortgage. But it is otherwise as against a purchaser of land who purchases in good faith and for a valuable consideration without notice of the assignment, and who receives at the time of his purchase and, as part of the same transaction a conveyance of the land and a satisfaction of the mortgage by the apparent owner of record from or through the vendor. *Marling v. Nommensen, supra.* We are not then merely dealing with the rights of debtors and holders of negotiable paper, but with those of purchasers of real estate.

By the Court.—The judgment of the circuit court is ordered modified so as to provide for judgment in favor of the plaintiff and against the defendant *Jones* for the amount found due the plaintiff, but not exceeding the amount due from *Jones* upon the note executed by him to Herman, costs in the discretion of the court below; and the judgment is in other respects affirmed; costs of this court in favor of appellant against both respondents.

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MARLING, Appellant, vs. FITZGERALD and another, imp., Respondents.

January 28—February 16, 1909.

Bills and notes: Consideration: Agreement to advance money: Transfer without indorsement: Defenses: Estoppel.

1. A note and mortgage were delivered to the payee, one H., a dealer in such securities, upon his agreement to advance the money subsequently as the maker should need it for a building. The maker knew that H. was likely to transfer the securities to an innocent third person. The mortgage was recorded and H. thereupon assigned and delivered it and the note as collateral security for his own note to one who took the securities in good faith without knowledge of the agreement between H. and the maker, but the note was not indorsed so as to make the assignee a holder in due course. After the assignment H. wholly failed to make the agreed advances. *Held:*

   (1) The note to H. was supported by sufficient consideration and was valid in his hands.

   (2) Although the assignee of H. was not a holder in due course, protected by the law merchant, yet the maker was estopped, as against him, to set up the defense of a failure of consideration by reason of the breach of the payee's agreement.

2. The rule that a negotiable instrument in the hands of an assignee for value and without notice of defenses, if he is not a holder in due course, is subject to such defenses as were available against his assignor, relates only to such defenses as existed at the time of the assignment.

3. The doctrine of *estoppel in pais*, where it is applicable, is not subordinate but supreme, staying the operation of other rules.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Action to foreclose a mortgage. The issues raised by the pleadings were closed by findings of fact, which may be presented as follows:

On March 19, 1903, defendant *Charles FitzGerald,* the then owner of the premises described in the complaint, duly

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mortgaged the same to defendant Herman to secure payment of said defendant *FitzGerald's* note, of like date, for $3,000, payable to the order of said Herman, three years after date, with interest at the rate of five per cent. per annum, and said mortgage was duly recorded. The transaction occurred pursuant to an application by said defendant to said Herman for a loan of $3,000, to be used in the erection of a building on the mortgaged premises, the money to be advanced as fast as the improvement progressed. Upon the delivery of the note and mortgage to Herman, he delivered to said defendant an acknowledgment of the purpose thereof and, in effect, that he was indebted to said defendant to the amount of the loan, payable as before indicated. March 20, 1903, said Herman borrowed of George Ellis $1,900, giving his promissory note therefor, payable three months after date, and, for collateral security for the payment of the debt, delivered to said Ellis said first-mentioned note and the mortgage, duly assigning the same in writing, but not so as to enable the said Ellis to record the assignment, and it never was recorded. Before the commencement of the action plaintiff became the owner of said $1,900 note and succeeded to all rights of said George Ellis to said collateral security. The said $1,900 note is wholly unpaid as well as the interest thereon from its date. No part of said $3,000 loan was ever paid to said *FitzGerald*. nor could he ever collect any part thereof. Herman was known to *FitzGerald*, at the time the mortgage was given, to be engaged in dealing in notes and mortgages and in loaning money for himself and others on real-estate security.

On such facts the court concluded: First, the note and mortgage were given without consideration; second, neither said Ellis nor plaintiff took said note in due course so as to be entitled to the protection of the law merchant; third, the latter holds the same subject to equities and defenses, including the defense of failure of consideration, which said *FitzGerald* would have, had the security remained in the hands of

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said Herman, and is, therefore, not entitled to enforce the same at all, and is liable to *FitzGerald* for his costs and disbursements in the action.

Judgment against plaintiff was ordered accordingly and was so rendered.

For the appellant there was a brief by *Goff, Hayes & Hannan,* and oral argument by *Guy D. Goff.*

For the respondent *FitzGerald* the cause was submitted on the brief of *Dorr & Gregory.*

MARSHALL, J. The foregoing statement presents this proposition: If A. mortgages his property to B. to secure a loan of money, to be advanced from time to time, knowing that he is a dealer in such securities, B. agreeing to make the advancements at times and in a manner specified, and in harmony with the understanding between the parties placing the mortgage upon record, acquiring the status as to all the world of being the owner of the securities and a debtor to A. for the money agreed to be advanced, and thereafter B., for value, sells and duly assigns such securities to C., who takes the same without knowing of the relation of debtor and creditor between A. and B. under the agreement as to the advancement of money, the transaction between B. and C. not being such as to give the latter the protection of the law merchant, and B., neither before the assignment nor thereafter, advances the money or any part thereof to A. and wholly breaches his agreement in that regard, can C., nevertheless, enforce the note and mortgage against A.?

If the proposition as stated be answered in the negative, as counsel for respondent contend it should be, and the learned circuit court decided, the judgment must be affirmed. If, on the contrary, it be answered in the affirmative, as counsel for appellant contend it should be, the judgment must be reversed and the cause be remanded for judgment according to the prayer of the complaint.

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The situation is governed by a few plain legal principles in respect to which the learned circuit court went astray.

Manifestly, the note was not without consideration to support it, merely because the money called for thereby was not advanced at the time it was given, nor at all. The agreement to advance the money, and the creation of the relations of debtor and creditor between Herman and *FitzGerald,* were amply sufficient to support the note, respecting the consideration feature, as the actual transition of the money from the former to the latter at the time the securities were delivered by the one to the other, would have been. That is too manifest to require discussion. The learned trial court, it seems, failed to distinguish between delivery of a note and mortgage by the payor to the payee for money to be advanced subsequently, the security to take effect presently,—and delivery thereof, but not to take effect till performance of a specified condition as to making the advancement. In the former circumstances, the security would be a valid obligation from the start, but in the latter, performance of the condition would be essential to such validity. *Nutting v. Minn. F. Ins. Co.* 98 Wis. 26, 73 N. W. 432; *Thorne v. Ætna Ins. Co.* 102 Wis. 593, 78 N. W. 920; *State ex rel. Jones v. Chamber of Comm.* 121 Wis. 110, 98 N. W. 930; *Golden v. Meier,* 129 Wis. 14, 107 N. W. 27; *Hodge v. Smith,* 130 Wis. 326, 333, 110 N. W. 192; *Ware v. Smith,* 62 Iowa, 159, 17 N. W. 459; *Belleville Sav. Bank v. Bornman,* 124 Ill. 200, 16 N. E. 210; *Merchants' Exch. Bank v. Luckow,* 37 Minn. 542, 35 N. W. 434; *Burke v. Dulaney,* 153 U. S. 228, 14 Sup. Ct. 816.

Again the learned circuit court misapprehended the law in assuming, if the note would be subject to defenses as between *FitzGerald* and Herman, because of the latter not having kept his agreement with the former by advancing the money, the former could, under all circumstances, including the taking of the securities for value and in good faith without neg-

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ligence, from Herman, by a third person, George Ellis, and without such taking having the essential of due course, of an indorsement of the note by Herman before maturity, make such defenses as against the third person. Such a situation is not governed absolutely by the law merchant. Before it can be solved in favor of the payor of the note, the familiar principle of equity, essential to the promotion of justice, must be dealt with, that if a person, by conduct, reasonably calculated to lead another to act upon the faith thereof, cause such other to act, without negligence and in such manner as to suffer damage if the appearances created by such conduct be not warranted by the true situation, such person is precluded from taking advantage thereof to such other's injury. Whether that would apply in a case of this sort; in case of a want of consideration to support the note, or in case of its not having validity as between the original parties except upon performance of a condition precedent which is not performed, or even in case of the maker not having any reasonable ground to apprehend a probability of the note being taken by a third person, for value, without apprehending the existence of any equities in regard thereto or being negligent in respect to the matter, need not be considered, because no such situation characterizes this case, as we have seen.

It would seem, upon principle, that the law of estoppel ought to govern this case in favor of appellant, especially since *FitzGerald* knew, or ought to have known, when he gave Herman the securities, that the latter was liable to transfer the same to another who would take the same as George Ellis did, in the exercise of due care, having a right to believe that they were just what they appeared to be. He put Herman in a position to easily delude another in that regard, even making no restriction as to a transfer of the paper or recording of the mortgage, notwithstanding knowledge of his business. Can one do that, and then take advantage of circumstances which such other had no knowledge of, nor any

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reasonable ground to suspect, to such other's injury? Can one put up the bar of his own negligence and thereby save himself from loss by failure of another to perform an agreement with him, forming a full consideration for his note, and thereby effect, as to an innocent third person, a fraud to such third person's injury? It would seem that the principle of estoppel plainly arises to the contrary,—so plainly that illustration by reference to precedents to support such conclusion is not necessary.

Passing to the field of precedents we find, as would be expected, that the principle suggested has been often applied to situations the same or similar to the one before us, for the protection of the innocent third person, and search fails to enable one to discover where it has been invoked in vain. On this, many cases cited by the learned counsel for appellant show so clearly the trend of authority that we will refer thereto with others: *Two Rivers Mfg. Co. v. Day,* 102 Wis. 328, 78 N. W. 440; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423; *Marling v. Nommensen,* 127 Wis. 363, 106 N. W. 844; *Bogart v. Stevens,* 69 N. J. Eq. 800, 63 Atl. 246; *Bush v. Cushman,* 27 N. J. Eq. 131; *Combes v. Chandler,* 33 Ohio St. 178; *Wilson v. Hicks,* 40 Ohio St. 418; *McNeil v. Tenth Nat. Bank,* 46 N. Y. 325; *Moore v. Metropolitan Nat. Bank,* 55 N. Y. 41; *Davis v. Beckstein,* 69 N. Y. 440; *Boardman v. L. S. & M. S. R. Co.* 84 N. Y. 157, 182; *Parker v. Conner,* 93 N. Y. 118; *Simpson v. Del Hoyo,* 94 N. Y. 189; *Cable v. Ellis,* 86 Ill. 525; *Marshall v. Ender,* 20 Ill. App. 312; *Atlanta G. Co. v. Hunt,* 100 Tenn. 89, 42 S. W. 482; *Kempner v. Huddleston,* 90 Tex. 182, 37 S. W. 1066; *Norfolk & W. R. Co. v. Perdue,* 40 W. Va. 442, 21 S. E. 755; 1 Jones, Mortgages (6th ed.) § 683.

In the text-book referred to the rule is laid down thus:

If a person induces another to take an assignment of the mortgage from the holder of it "upon the representation that it is a good and valid security" he cannot subsequently im-

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peach the validity of the mortgage "in the hands of such assignee. Having by word or deed induced another to part with his money for the security, he is not allowed to repudiate the truth of his representation, and escape the payment of the obligation by showing that, as between himself and the former holder," it was invalid.

Whether that applies generally we need not now decide or go further than the facts of this case.

The principle stated is not restricted to acts or representations directly between the maker of the securities and the assignee. Constructive representations, conduct equivalent to actual representations, as by giving to the holder of securities all of the characteristics of ownership, so he may hold and transfer the same with all the usual appearances of absolute right to do so and with reasonable knowledge that he will or may do so, is certainly sufficient. That runs through all the cases cited and many more that might be referred to. True, such cases do not all exactly fit the facts of this case, but they do so in principle. *Bush v. Cushman, supra,* is exactly in point, when we consider that conduct equivalent to actual representation, *inter partes,* is likewise equivalent thereto in effect, as to *estoppel in pais.* It is particularly applicable here, since *FitzGerald,* as we have seen, must have known from the nature of Herman's business that he was liable to and probably would sell the securities to some person without disclosing the nature of his business relations with the payor.

Bogart v. Stevens, supra, is quite like this case. We are unable to see any material distinction between clothing an agent with the semblance of being the owner of securities accompanied by actual authority to transfer the same for value, and vesting the actual title to such securities in a person with all the semblance of absolute ownership, knowing that he is liable to, and probably will, transfer them to another, for value, having no knowledge, or reasonable means of knowledge, of any present or future defense thereto.

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In *McNeil v. Tenth Nat. Bank, supra,* it is said, in effect, that, except as regards the effect of the law merchant, an assignee of assignable papers obtains no greater right than his assignor possesses; but said the court:

"It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

Counsel for respondent place their sole reliance on the idea that the note was without consideration at the start, hence without validity, which is wrong, as we have seen, and on the law merchant as incorporated into sec. 1676—19 of the Negotiable Instrument Statute (ch. 356, Laws of 1899), to the effect that the taker for value of a negotiable instrument without indorsement takes no better title than his assignee had thereunder, and sec. 1676—28, to the effect that a holder of negotiable paper, who does not acquire it in due course, is subject to the same perils as regards defenses by the payor as the payee was. Those rules, as we have seen, give way to the supreme rule of *estoppel in pais.* We are referred with confidence to *Boyle v. Lybrand,* 113 Wis. 79, 88 N. W. 904. Suffice it to say, we are unable to see that it touches the question in hand.

We are further referred to *Rapps v. Gottlieb,* 142 N. Y. 164, 36 N. E. 1052, where the court grounded its decision on the doctrine that an assignee, without indorsement, of negotiable paper, takes it subject to all the defenses available as to the original parties, holding it to be applicable because the note and mortgage in question never had validity as obliga-

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tions, since they were delivered to the named payee to take effect according to their tenor and not otherwise at all, only upon the happening of a condition precedent. Under those circumstances, negligence or inexcusable holding out on the part of the payor essential to efficient application of the doctrine of *estoppel in pais* was not found to exist. Without appreciation of the precise grounds for the decision, one would be quite liable to be led astray, especially in view of a brief discussion at the closing of the opinion of the invocability of the doctrine of *estoppel in pais*. The court reasoned thus:

"It is a rule of last resort, applicable only where all others fail; it is a doctrine subordinate and not dominant, which reverses no other, but submits to the authority of all, and is adequate to an ultimate decision only when it has the field to itself."

As those expressions are liable to be understood they hardly give proper dignity to the doctrine of *estoppel in pais*. True it is a rule of last resort, but where it is applicable it is not subordinate. It stays the operation of other rules which have not run their course, when to allow them to proceed further would be a greater wrong than to permanently enjoin them. It is a rule of justice which, in its proper field, has a power of mastery over all other rules. It is a rule, by no means to be discredited, but rather one entitled to the distinction of being one of the greatest instrumentalities to promote the ends of justice which the equity of the law affords.

There is this further insurmountable difficulty in sustaining the judgment: The rule that a negotiable instrument in the hands of an assignee for value and without notice of defenses as between the original parties is subject, nevertheless, to such defenses, has relation to such equities or defenses as existed at the time of the transfer, not to latent defenses or equities which possibly may at some future time exist. As said in *Bush v. Cushman*, 27 N. J. Eq. 131: It does not embrace "equities or defenses springing from defaults, or even fraud of the assignor, committed subsequent to the assign-

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ment, and which had no existence, and were simply possibilities, at the time of the assignment."

The same doctrine was applied in *Coster v. Griswold,* 4 Edw. Ch. 364, 374. The views of the court are thus expressed:

"All that the court of law or equity can do in such cases, since they recognize and protect the rights of assignees of choses in action, is, to allow them to take, subject always to any defense, legal or equitable, which existed in favor of the debtor against the original holder or creditor at the time of the transfer or assignment. Now, the question arises: What existing equity or defense was there against these bonds . . ." when they were pledged to the "United States Bank as collateral security . . ."? And, again, "Where an assignee takes in good faith, his right to hold will not be disturbed or divested by any subsequent event or after-accruing right or equity of the debtor."

To the same effect are *Chance v. Isaacs,* 5 Paige Ch. 592; *Cornish v. Bryan,* 10 N. J. Eq. 146; *Losey v. Simpson,* 11 N. J. Eq. 246, 253; *Murray v. Lylburn,* 2 Johns. Ch. 441, 442; *Flemming v. Hobcken,* 40 N. J. Law, 270; *North Bergen v. Eager,* 41 N. J. Law, 184, 189; *Ex parte Hale,* 3 Ves. Jr. 304; *Terney v. Wilson,* 45 N. J. Law, 282.

Here, as we have seen, at the time of the assignment to George Ellis, Herman was the absolute owner of the note and mortgage. They were not waiting upon the happening of any event to give them validity. Herman owed Ellis $3,000, but was not in default. He had, at best, a possible contingent defense or equity. Under those circumstances, within the authorities cited, Ellis could safely take, in good faith, for value, the note from Herman. The latter's subsequent mere default could not operate to his prejudice.

By the Court.—The judgment is reversed, and the cause remanded for judgment according to the prayer of the complaint.

BARNES, J., dissents.

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GOETZINGER, Appellant, vs. DONAHUE and another, Respondents.

SAME, Respondent, vs. SAME, Appellants.

January 29—February 16, 1909.

Corporations: Assignment of stock as collateral security: Right to vote: Transfer on books: When to be surrendered: Contract construed: Protection of pledgee's security against impairment: Right to be officer of corporation

1. In an action involving the right to vote corporate stock assigned as collateral security for notes given for its purchase price, it is *held*, upon the evidence, that by the understanding and agreement of the parties the pledgor has the right to vote the stock, although it was not expressly so stipulated in their written contract.

[2. Whether, in general, the right to vote corporate stock assigned as collateral security is in the pledgor or the pledgee, not determined.]

3. Upon the sale of all the stock of a corporation notes were given for a part of the purchase price and most of the stock was assigned to the vendor as collateral security therefor. One share was issued to him and it was agreed that he should be a director, officer, and employee of the company, so as to be in a position to protect his securities. *Held*, that he was entitled to have the stock so pledged transferred to him on the books of the company, and that a new certificate should be issued to him showing the transfer and that it issued pursuant to the judgment of the court.

4. The assignment of the stock as collateral in such case being made, under the agreement, "to secure the payment of said notes, the same to be held by the [payee] until said notes shall be fully paid," no part of the pledged stock need be surrendered until the indebtedness evidenced by the notes is fully paid.

5. There being nothing in the agreement warranting an inference that the stock was pledged to secure anything other than the notes mentioned, the pledgee was not entitled to hold it to secure payment of damages by reason of a breach of his agreement in respect to his being retained as a director and officer of the company.

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6. In an action for determination of the rights of all parties under such sale and agreement, the judgment should provide for the continuance of the vendor and pledgee of the stock as a director, officer, and employee of the company until the debt to him should be paid, upon the condition that he perform the duties of such positions; and his interest in the property should be protected against transfers or other acts of the corporation which might improperly impair his security.

APPEALS from a judgment of the circuit court for Milwaukee county: WARREN D. TABRANT, Circuit Judge. *Reversed.*

In 1892 the Cream City Mirror Plate Company was organized with a capital stock of $3,000. In 1898 *John M. Goetzinger* had become the sole owner of the stock. The net assets of the corporation were then $54,000. On September 27, 1905, pursuant to prior negotiations with one *T. F. Donahue, Goetzinger* entered into a written agreement for the sale of the capital stock of the corporation to *Donahue.* The agreement provided that the stock should be increased to an amount equal to the net assets of the corporation; *Donahue* should pay *Goetzinger* $25,000 in cash and give *Goetzinger* five notes of equal amounts for the balance, to be paid in one, two, three, four, and five years, and to be secured by an assignment as collateral to *Goetzinger* of all of the stock of the corporation, save $10,000 worth; each party was to deposit $3,000 to insure the performance of the agreement; one share of stock was to be issued to *Goetzinger,* and the balance, issued to *Donahue,* was to be assigned, save $10,000 worth, to *Goetzinger* as collateral to secure the payment of the notes; *Donahue* was to be elected vice-president of the corporation, *Goetzinger* to be elected president, and to countersign all checks, to collect the outstanding and to pay all debts due, and to receive an annual salary of $1,800; and after the expiration of a year *Goetzinger* was to be employed to perform these duties until the notes were fully paid.

In January, 1906, *Donahue* and *Goetzinger* modified this agreement as follows: The capital stock was to be $50,000;

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the balance of the assets of the corporation was to become a debt due to *Goetzinger* from the corporation; *Donahue* was to make a cash payment of $20,000, and for the $30,000 balance he was to make six notes of $5,000 each, payable one each year for six years, which notes were to be secured by an assignment of the stock according to the agreement; and *Goetzinger* was to become vice-president and treasurer, *Donahue* president, and one *F. C. Coggeshall* secretary.

The stock was increased to $50,000. One share was issued to *Goetzinger,* ten shares to *Coggeshall,* and 489 shares to *Donahue.* The officers were elected as agreed. *Donahue* paid *Goetzinger* $20,000 in cash, gave his notes for $30,000, and by written indorsement assigned the stock issued to him as security to *Goetzinger;* and the corporation gave its note for $4,000 to *Goetzinger.* The assignment of the stock was never recorded on the books of the corporation. An agreement was made between *Goetzinger* and the corporation whereby *Goetzinger* was to act as treasurer and financial manager of the corporation for the period of six years, and *Goetzinger* thereby agreed to perform all the services that might be required of him during that time. *Goetzinger* also received an assignment of all bills due the corporation and agreed to pay all its debts then due. A new certificate of stock was issued to *Donahue* in place of the one originally issued to him, which contained a mistake as to the number of shares. This certificate was duly assigned to *Goetzinger* as collateral.

At the annual meeting of the corporation in January, 1907, *Goetzinger* voted one share of stock, *Donahue* 439, *Coggeshall* ten shares, and one Schroeder, to whom *Donahue* had sold fifty shares of stock, voted the rest of the stock. *Donahue, Coggeshall,* and Schroeder were elected directors, and at a directors' meeting later in the day *Donahue* was elected president, *Coggeshall* secretary, Schroeder vice-president, and *Donahue* treasurer. A motion was adopted to dispense with the serv-

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ices of *Goetzinger* as financial manager because of incompetency and neglect of duty, and the secretary was instructed to notify him. Since this meeting *Goetzinger* has been excluded from participation in the management of the corporation.

Goetzinger instituted proceedings asking that the secretary be required to make a transfer on the books of the corporation of the stock held by him as security. *Donahue* testified that *Goetzinger* had agreed that he should vote the stock owned by him, that *Goetzinger* understood that *Donahue* had the right to vote this stock, and that *Goetzinger* had declared that he feared that *Donahue* might vote him wholly out of participation in the management of the corporation. It also appears that *Goetzinger* made no claim at the stockholders' meetings to any right to vote the stock assigned to him as collateral, but assumed and acquiesced in *Donahue's* right to vote it, nor did he take steps to secure a transfer of this stock on the books of the corporation before the stockholders' meetings so as to enable him to vote it.

The court found that there was no good reason for the corporation dispensing with *Goetzinger's* services; that *Donahue* was entitled to vote the stock held by him but deposited with *Goetzinger* as collateral; that *Goetzinger* was entitled to the issuance of a certificate of stock reciting that the stock shares were held by him as security; and that *Goetzinger* was entitled to hold the stock as security for any damages suffered by him because of the breach of contract in dispensing with his services as treasurer and financial manager. Both parties appeal from the judgment entered on the findings of the court.

Frank M. Hoyt, for the plaintiff, contended, *inter alia,* that the legal title to the stock in question is in the plaintiff. Sec. 1751, Stats. (1898); Colebrooke, Collateral Securities (2d ed.) §§ 271, 272, 276; Id. (1st ed.) § 282. The right to vote the stock is in appellant as the holder of the legal title. 3 Thomp. Corp. § 3872; Colebrooke, Collateral Securities (1st ed.) § 283, p. 371; *Comm. ex rel. Eberhardt v. Dalzell,* 152 Pa. St. 217, 221; *Vail v. Hamilton,* 85 N. Y. 453, 458;

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Sleeper v. Goodwin, 67 Wis. 577, 592; *Heath v. Silverthorn L. M. & S. Co.* 39 Wis. 146, 158; *In re Argus P. Co.* 1 N. Dak. 435, 12 L. R. A. 782, note 1. Transfer on the books to plaintiff was expressly authorized by the written assignment indorsed on the back of the certificate. Sec. 1751, Stats. (1898), gives the right to such transfer and a new certificate; and the law, independent of the statutes, gives this right. Colebrooke, Collateral Securities (2d ed.) § 272; *Hubbell v. Drexel & Co.* 11 Fed. 115, 118; *Farmers' Nat. G. Bank v. Wilson,* 58 Cal. 600; *Skiff v. Stoddard,* 63 Conn. 198; *Jones v. P. & C. R. Co.* 32 N. H. 544; *Second Nat. Bank v. First Nat. Bank,* 8 N. Dak. 50. *Goetzinger* as pledgee is entitled to any dividends declared during the continuance of the pledge. 2 Cook, Stockholders, § 468, p. 827, and cases cited in note 3. The statute (sec. 1751, Stats. 1898) makes the transfer on the books of the corporation essential to the preservation of this right.

Edgar L. Wood, for the defendants, as to the rights of the parties with respect to the pledged stock, cited *Haring v. Hamilton,* 107 Wis. 112, 117; *Burgess v. Seligman,* 107 U. S. 20; *James M. Co. v. Hankwitz,* 137 Wis. 302, 118 N. W. 806; *Klinkert v. Fulton S. & M. Co.* 113 Wis. 493, 501; *Geilfuss v. Corrigan,* 95 Wis. 651, 665; *Morey v. Fish Bros. W. Co.* 108 Wis. 520, 527; Jones, Pledges, §§ 8, 441, 442, 720; *Spreckels v. Nevada Bank,* 113 Cal. 272, 33 L. R. A. 459; *State ex rel. Reed v. Smith,* 15 Oreg. 98; *Vowell v. Thompson,* 3 Cranch C. C. 428; *McHenry v. Jewett,* 26 Hun, 453; *Haskell v. Read,* 68 Neb. 107, 93 N. W. 998; *Hoppin v. Buffum,* 9 R. I. 513; *Ex parte Willcocks,* 7 Cow. 402; *Moore v. Marshalltown O. H. Co.* 81 Iowa, 45; *Haegele v. Western S. Mfg. Co.* 29 Mo. App. 486; *Clarke v. Cent. R. & B. Co.* 50 Fed. 338, 15 L. R. A. 683.

SIEBECKER, J. The parties by stipulation enlarged the issues originally presented by the petition and answer so as to present the question of their legal and equitable rights arising

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under the facts and circumstances of the transaction, whereby *Donahue* bought *Goetzinger's* interest in the corporation, the unpaid purchase price due *Goetzinger* was to be secured by a pledge of most of the shares of stock, and *Goetzinger*, by remaining in the positions of director, officer, and employee at a stated salary, had such a participation in the conduct of the corporate affairs as would enable him to properly protect his interests.

The principal controversy is whether *Donahue* or *Goetzinger* has the right to vote the stock assigned to *Goetzinger* as collateral. Both parties claim this right under the facts and circumstances of the case. In the light of the agreement of the parties, whether the right to vote stock in a corporation, transferred by indorsement by the owner of the certificate as collateral to secure performance of the pledgor's obligation, is vested in the pledgor or pledgee, need not be determined in this action. The court found that it was understood between them that *Donahue*, as owner of nearly all of the corporate interests, should have the general management of the corporate business and the right to vote the stock transferred as collateral to secure his indebtedness to *Goetzinger* after the reorganization of the corporate affairs in the manner agreed upon by them and the transfer of *Goetzinger's* interest to *Donahue* pursuant to such arrangement. No question of public policy or voting power secured from stock ownership being involved, it is not questioned but that the parties might determine by agreement who should have the right to vote such stock. Upon examination of the case we are led to the conclusion that the trial court is sustained in its finding that, by arrangement and understanding of the parties, *Donahue* has the right to vote the stock transferred to *Goetzinger* as collateral, though it is not expressly so stipulated in the written contract. The evidence of *Donahue* is clearly and definitely that it was understood and agreed between them that he was to vote the stock; that before the reorganization of the

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corporate affairs and the sale of the stock to *Donahue, Goetzinger* expressly recognized this right by acknowledging that *Donahue* could so vote the stock under his right as owner as to prevent *Goetzinger* from holding the office of director; that because *Goetzinger* recognized the right he demanded that the contract contain a stipulation that he should be elected a director for the ensuing six years; and that he acquiesced in *Donahue's* voting this stock at stockholders' meetings. *Goetzinger* testifies to the effect that the right of voting this stock was not expressly considered by them in their negotiations.

Considering these facts and circumstances in the light of the expressed purpose that *Donahue* was to buy out *Goetzinger's* interest in the corporation; have the general management of the corporate affairs; that *Goetzinger* was to be relieved of such responsibility and was to retain but one share of stock to enable him to hold a directorship and an office for the purpose of putting him in such a position that he could keep informed of the business affairs and protect his securities,—it is obvious that the trial court's conclusion that it was understood and agreed between the parties that *Donahue* was to vote the stock he transferred to *Goetzinger* as collateral to secure payment of his debt is justified by a clear and satisfactory showing in the evidence, and the court, therefore, properly adjudged that he was entitled to exercise this right, but that *Goetzinger* was entitled to have the stock so pledged as collateral transferred to him upon the books of the corporation by the issuance of a new certificate showing such transfer and that it so issued pursuant to the judgment of the court.

On defendants' appeal it is contended that the court erred in decreeing that *Goetzinger* was entitled to hold all of the stock pledged as security until the notes were fully paid. The agreement of September 27, 1905, contains a stipulation covering this question, which provides that the stock so pledged as collateral is "to secure the payment of said notes, the same to be held by the party of the first part until said notes shall

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be fully paid." The evident intent of this agreement is that no portion of the pledged stock need be surrendered until the indebtedness evidenced by the notes is fully paid.

The defendants further claim that the judgment is erroneous in providing that *Goetzinger* is entitled to hold the stock so pledged as collateral to secure payment to him of any damages he may be awarded by reason of any breach by *Donahue* of the agreements of September 27, 1905, and of January, 1906. We find nothing in the written agreement or in the negotiations warranting the inference that the parties agreed that the stock pledged should secure any demand for damages *Goetzinger* might have for breach of these contracts. All of the written stipulations and the negotiations show that the parties intended this transfer of the stock should secure only the payment of the notes. The terms of the contract clearly indicate an intent by the parties that the transfer should be limited to securing the payment of the unpaid purchase money, and it contains nothing which could be construed as securing payment of damages for breach of contract in not keeping *Goetzinger* in the employ of the corporation. The provision in the judgment declaring that *Goetzinger* is to hold the stock as security for the payment of damages resulting from any alleged breach of contract in this respect is erroneous and must be reversed.

These considerations dispose of the questions specifically presented in argument. It is, however, apparent from the proceedings in the course of the trial that the parties are desirous of having all questions embraced in the issues passed upon and determined. This, in our opinion, is not fully accomplished by the judgment as entered. It is manifest that one of the controlling considerations which induced *Donahue* and *Goetzinger* to enter into the agreements they made was that *Goetzinger's* security was to be maintained by a provident administration of the corporate affairs and a diligent and faithful prosecution and conduct of its business. To accom-

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plish and promote this result the continuance of *Goetzinger* as a director, officer, and as an employee of the corporation was of paramount importance to him. It is manifest from the stipulations of the contract providing for these matters that both parties so considered it. It is also important that the corporate business be continued in such manner and under such conditions as to properly preserve it as *Goetzinger's* security. These circumstances entitled *Goetzinger,* under his contract with *Donahue,* to have it adjudged that the status and contractual relation created by them should be maintained by securing his reinstatement in the position of director and in the office of treasurer and financial manager and by his retention in the employ of the corporation at the stipulated salary until the debt evidenced by the notes should be paid, upon the condition that he perform the duties of these respective offices and positions. The judgment should also provide that *Goetzinger's* interest in the property should be protected against any transfer, mortgage, or other incumbrance of the property, and that the corporation be restricted in contracting liabilities to such current loans as may be necessary for the proper conduct of its business. We call attention to these as some of the questions properly within the issues presented which should be provided for in the final judgment in order to protect the rights and interests of the parties.

The judgment entered must be reversed, and the cause remanded to the trial court to award judgment which shall determine and adjudicate all matters necessarily embraced in a final determination of the issues as presented by the parties.

By the Court.—Judgment reversed, and the cause remanded to the lower court with directions to enter judgment as indicated in this opinion. Neither party will recover costs in this court, and the plaintiff will pay the clerk's fees on appeal.

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ELMERGREEN, Respondent, vs. WEIMER, Appellant.

January 29—February 16, 1909.

Corporations: Action, when may be brought by stockholder: Necessary parties: Pleading: Dissolution of corporation: Continuance for bringing of actions, etc.: Statutes of other states: Presumptions.

1. The wrongful taking and conversion by an officer of a corporation of moneys and property belonging to it is primarily a wrong to the corporation and it has the primary right to bring an action therefor.
2. If, in such case, the corporation fails to sue, it is a necessary party defendant in an action brought by a stockholder.
3. Assuming that an allegation that a corporation has been dissolved is sufficient on demurrer, a further averment that it has "no legal existence at the present time" states merely a conclusion of law, which is not admitted by the demurrer.
4. In the absence of allegations to the contrary it will be presumed on demurrer that the laws of another state with respect to corporations organized therein provide—like our sec. 1764, Stats. (1898)—that after such corporations are dissolved they shall continue for three years to be bodies corporate for the purpose of prosecuting and defending actions and of enabling them to settle and close up their business, etc.
5. Before a stockholder can bring an action for a wrong to a corporation which, though dissolved, still exists for the purpose of prosecuting and defending actions, he must show a demand upon the corporation to bring the suit or some sufficient reason for failure to make such demand.
6. An allegation that plaintiff was a stockholder in a corporation when it was dissolved does not show that he was a stockholder when the action was commenced, some eighteen months thereafter.
7. An allegation that defendant controlled and dominated a corporation "up to the time of the dissolution thereof" does not show that he continued to dominate and control it thereafter, so as to excuse plaintiff's failure to demand that the corporation itself bring the action to remedy a wrong done to it by defendant. It cannot be presumed that after the dissolution defendant dominated or interfered with the winding up of the corporation as provided by law.

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APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an appeal from an order overruling a demurrer to the amended complaint. The complaint is as follows:

"That at all times hereinafter mentioned and up to about April 18, 1906, the Michigan Ore Company was a corporation duly organized and existing under and by virtue of the laws of the state of Utah, and that said Michigan Ore Company was incorporated and organized by the defendant and certain of his business allies and associates for the avowed purpose of conducting mining operations; that the capital stock of the said Michigan Ore Company was $1,000,000, divided into 1,000,000 shares of the par value of $1 each, and that, as the plaintiff is informed and verily believes, at the time of the organization of said corporation 500,000 shares of said stock were duly set apart as treasury stock and placed in the treasury of said corporation and were the property of the said Michigan Ore Company; that from the organization of the said Michigan Ore Company and up to the time of the dissolution of said corporation the defendant, *John B. Weimer,* was the principal stockholder therein, and by himself and his agents held the controlling interest in the capital stock in the said Michigan Ore Company and elected the board of directors thereof, personal friends and business associates of the said *John B. Weimer,* who have at all times conducted the business of the said Michigan Ore Company in strict accordance with directions given by the said *John B. Weimer,* and have in all things pertaining to the said corporation been absolutely under the domination and control of the said *John B. Weimer,* and that the said *John B. Weimer* continued to control the directors and officers of said Michigan Ore Company up to the time of the dissolution thereof; that at all times herein mentioned and up to the time of the dissolution of said corporation the plaintiff was a stockholder in said company and held 50,000 shares of the capital stock of said company; that on or about the month of October, 1904, the defendant unlawfully took and carried away from the treasury of said company said treasury stock the property of said company, and unlawfully sold the same for a large sum of money, the exact amount of which is unknown to plaintiff, and converted

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the proceeds thereof to his own use; that the amount realized by said defendant on the sale of said treasury stock exceeded the sum of $10,000, as plaintiff is informed and verily believes; that about the same time the defendant unlawfully, and in violation of the rights of said company and its stockholders, seized upon the cash in the treasury of said Michigan Ore Company, amounting to about $8,600, as plaintiff is informed and believes, and converted the same to his own use; that after the taking and conversion of the said treasury stock and cash by the defendant and in order to silence the minority stockholders the defendant caused said board of directors and officers of said company to transfer and convey to the Ophir Tunnel Company, another mining corporation organized by the defendant and incorporated under the laws of the state of Utah, certain mining claims to which the Michigan Ore Company had record title, thus rendering the Michigan Ore Company insolvent, and exchanged with said minority stockholders other than the plaintiff stock in the Ophir Tunnel Company for their holdings in the Michigan Ore Company, and thus further increased his holdings of stock in the Michigan Ore Company and deprived the plaintiff of the support and assistance of the other minority stockholders; that, as plaintiff is informed and believes, the defendant called a special meeting of the stockholders of the Michigan Ore Company, which was held in Salt Lake City, Utah, on or about April 18, 1906, and that at said meeting, by a vote of the stock owned and controlled by the defendant as aforesaid, said corporation was dissolved and ceased to be a body corporate, and, as plaintiff is informed and believes, said corporation has no legal existence at the present time; that the plaintiff brings this action on his own behalf and on behalf of all other stockholders of the Michigan Ore Company similarly situated, if any there be, and for the purpose of compelling an accounting by the defendant and restitution to plaintiff and such other persons as may be entitled thereto as stockholders of the Michigan Ore Company of the moneys so taken by defendant and of the value of the treasury stock of the Michigan Ore Company so taken by defendant and converted to his own use.

"And for another and separate cause of action the plaintiff repeats all the allegations contained in the first cause of action regarding the organization of the Michigan Ore Company by

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the defendant and his ownership and control by himself and his agents of the majority of the capital stock thereof, and his consequent control of the board of directors of said corporation at all times herein mentioned, and hereby refers to and makes the same a part of this cause of action as if again set out in full herein; and plaintiff further alleges that at the times herein mentioned and up to the time of the dissolution of said corporation he was a stockholder in the Michigan Ore Company and was the owner of 50,000 shares of the capital stock of said company; and, further complaining, plaintiff respectfully alleges and shows that, as plaintiff is informed and believes, certain mining claims in the state of Utah were turned into the Michigan Ore Company at the time of the organization of said corporation in payment of the capital stock thereof, and that the title of said mining claims were held in the name of the defendant, *John B. Weimer*, in trust for said Michigan Ore Company; that, upon demand of certain stockholders of said company at some time in the summer of 1904, the defendant, who was then secretary and treasurer of the Michigan Ore Company, executed to said company assignments of said mining claims so held in his name and delivered the same to said company; that, as such secretary and treasurer, it was his duty to place said assignments upon record, but that he withheld the same, and thereafter and with intent to defraud the Michigan Ore Company and the stockholders thereof he executed new assignments of said mining claims to the Ophir Tunnel Company and placed the same upon record; that this was all done without the knowledge of the minority stockholders and without any authority; that the Ophir Tunnel Company is a corporation organized by defendant and incorporated under the laws of the state of Utah, and defendant is the principal stockholder in said corporation, as plaintiff is informed and believes, and that the said Ophir Tunnel Company claims to be the owner of said mining claims under said assignments and refuses to return the same to the Michigan Ore Company; that the titles and descriptions of said mining claims are unknown to plaintiff, but that said mining claims were and are worth at least $150,000, as plaintiff is informed and believes; that this action is brought by plaintiff on behalf of himself and all other stockholders of the Michigan Ore Company similarly situ-

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ated; that, as plaintiff is informed and believes, the defendant called a special meeting of the stockholders of the Michigan Ore Company which was held in Salt Lake City, Utah, on or about the 18th day of April, 1906, and at said meeting, by a vote of the stock owned and controlled by the defendant as aforesaid, said corporation was dissolved and ceased to be a body corporate, and, as plaintiff is informed and believes, said corporation has no legal existence at the present time.

"Wherefore plaintiff prays for a decree of this court requiring the above-named defendant, *John B. Weimer,* to account for the moneys and treasury stock so wrongfully taken and converted to his own use and for the value of the mining claims so transferred by him to the Ophir Tunnel Company, and that the defendant be required to pay to the plaintiff and such other persons as may be entitled thereto the amount so found to be due on said accounting, and for such other and further relief in the premises as may be just and equitable, and that the plaintiff do have and recover the costs and disbursements of this action."

The defendant demurred on the following grounds:

"(1) That the complaint does not state facts sufficient to constitute a cause of action.

"(2) That the court has no jurisdiction of the subject of the action.

"(3) That there is a defect of parties defendant by reason of the omission of the Michigan Ore Company, its officers and directors."

For the appellant there was a brief by *Timlin & Grogan,* and oral argument by *W. H. Timlin, Jr.*

H. L. Kellogg, for the respondent, cited 2 Clark & M. Priv. Corp. § 549, and cases cited; Id. §§ 322–329; 3 id. § 865; *Crumlish's Adm'r v. S. V. R. Co.* 28 W. Va. 623; 1 Jones, Ev. (1st ed.) § 82, and cases cited in note 8; *Guilford v. W. U. Tel. Co.* 59 Minn. 332; *Wineburgh v. U. S. S. & St. R. A. Co.* 173 Mass. 60.

KERWIN, J. The complaint and grounds of demurrer are set out in the statement of facts and need not be repeated

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here. The wrong complained of is primarily a wrong to the corporation and through it a wrong to the stockholders; therefore the primary right of suit to redress the wrong rests with the corporation. The Michigan Ore Company therefore had the right to prosecute this action, and, failing to do so, was a necessary party defendant in an action brought by a stockholder. *Donnelly v. Sampson,* 135 Wis. 368, 115 N. W. 1089; *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964; *Jenkins v. Bradley,* 104 Wis. 540, 80 N. W. 1025; 2 Cook, Corporations, § 738. The complaint alleges that the Michigan Ore Company had been dissolved, and, assuming for the sake of argument that this allegation is sufficient on demurrer, the further allegation that it has "no legal existence at the present time" is insufficient, and not admitted by the demurrer, because such allegation is simply a conclusion of law, and conclusions of law in pleadings are not admitted by demurrer or sufficient allegations of facts. *Brown v. Phillips,* 71 Wis. 239, 36 N. W. 242; *Kellogg v. Larkin,* 3 Pin. 123; *Williams v. Williams,* 63 Wis. 58, 23 N. W. 110; *State ex rel. Weiss v. District Board,* 76 Wis. 177, 44 N. W. 967. Where a foreign law is not pleaded the presumption is that it is the same as our law. *Rape v. Heaton,* 9 Wis. 328; *Osborn v. Blackburn,* 78 Wis. 209, 47 N. W. 175; *St. Sure v. Lindsfelt,* 82 Wis. 346, 52 N. W. 308. And this rule applies to statutes subject to some exceptions not necessary to consider here. *Hull v. Augustine,* 23 Wis. 383; *Pierce v. C. & N. W. R. Co.* 36 Wis. 283; *Schoenberg v. Adler,* 105 Wis. 645, 81 N. W. 1055; *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703; *Hyde v. German Nat. Bank,* 115 Wis. 170, 91 N. W. 230; *Edleman v. Edleman,* 125 Wis. 270, 104 N. W. 56. Sec. 1764, Stats. (1898), provides:

"All corporations whose term of existence shall expire by their own limitation, or which shall be voluntarily dissolved in the manner provided by law or by its articles of association, or shall be annulled by forfeiture or otherwise, shall never-

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theless continue to be bodies corporate for three years thereafter for the purpose of prosecuting and defending actions and of enabling them to settle and close up their business, dispose of and convey their property and divide their capital stock, and for no other purpose; and when any corporation shall become so dissolved the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known, shall, subject to the power of any court of competent jurisdiction to make, in any case, a different provision, continue to act as such during said term and shall be deemed the legal administrators of such corporation with full power to settle its affairs, sell or dispose of and convey all its property, both real and personal, collect the outstanding debts, and after paying the debts due and owing by such corporation at the time of its dissolution and the costs of such administration divide the residue of the money and other property among the stockholders or members thereof."

The legal existence of the Michigan Ore Company at the time this action was commenced not being negatived because of the insufficiency of the allegations in that regard, and the foreign law respecting the existence of corporations for winding-up purposes being presumed, in the absence of allegations to the contrary, to be the same as our own, the Michigan Ore Company continued to be a body corporate for three years after the alleged dissolution for the purpose of prosecuting and defending actions and of enabling it to settle and close up its business as provided by the statute above referred to. Regarding the law of the foreign state, therefore, the same as ours and the corporation consequently having existence, it was incumbent upon the plaintiff to show a demand upon the corporation to bring the suit or some justifiable reason for failure to make a demand. Counsel for respondent, as we understand his argument, undertakes to excuse lack of demand upon the ground that the corporation had no existence after dissolution, and, further, upon the allegation that the defendant had "controlled and dominated the Michigan Ore

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Company, its officers and directors up to the time of dissolution thereof." As we have seen, the Michigan Ore Company, upon the allegations of the complaint well pleaded, was still in existence for the purpose of suing and being sued; hence was the proper party plaintiff, unless it was established that plaintiff, a stockholder, had the right to sue. The complaint alleges that the Michigan Ore Company was dissolved April 18, 1906. This action was commenced in October, 1907. There is no positive allegation that the plaintiff was a stockholder when the action was commenced. The only allegation on the subject is that he was a stockholder at the time of dissolution. There is nothing whatever in the complaint showing that when the action was commenced the plaintiff was a stockholder. All the allegations of the complaint may be admitted and yet the plaintiff have owned no stock when this action was commenced. But, aside from this, we think the allegation that defendant controlled and dominated the corporation up to the time of dissolution is wholly insufficient. If the allegation were not limited to the time of dissolution, it might be said that the status of control and domination, having been shown to exist at a certain time, would be presumed to continue. But by the express allegations of the complaint the control and domination is limited to the time of dissolution. A new situation arose by the dissolution, and the corporation under the law was vested with power after dissolution to wind up its affairs and was the proper party to sue for that purpose. It cannot be presumed that defendant, after dissolution, dominated or interfered with the winding up as provided by law. So we think upon the facts pleaded no case was made entitling plaintiff to bring the action. We think it is also clear under the allegations of the complaint that the laws of the foreign state must be regarded the same as our own, and therefore the corporation had legal existence for three years after dissolution to sue and be sued. The Michigan Ore Company, therefore, was a necessary party defendant

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if the plaintiff could maintain the action. 10 Cyc. 997; 22 Ency. Pl. & Pr. 1303, 1304. We are convinced that the complaint fails to show a right of action in the plaintiff, and that there is a defect of parties in failure to make the Michigan Ore Company a party defendant.

Another ground of demurrer is argued, namely, whether the courts of this state will take jurisdiction of a case of this nature against a foreign corporation. This is an interesting question, but not necessary to consider and which we do not decide.

By the Court.—The order appealed from is reversed, and the cause remanded with instructions to the court below to sustain the demurrer, and for further proceedings according to law.

TIMLIN, J., took no part.

WILL OF ADELMAN: FLAHERTY, Executrix, and others, Appellants, vs. ADELMAN, Respondent.

January 29—February 16, 1909.

Wills: Trusts: Devise of rents and profits: Future estates: Perpetuities.

1. A testatrix devised the future rents and profits of lands to her father during his life; at his death to her brother and three sisters and survivor of them for life; and after the death of the last survivor the lands to be sold and the proceeds divided among the children of the persons last named and her half brothers and sisters, children of her father, who should be surviving at that time. There was no devise in trust and nothing in the will to bring it within the provisions of sec. 2081, Stats. (1898). *Held:*

   (1) The will did not create any trust.

   (2) The disposition so made of the rents and profits is, under sec. 2060, Stats. (1898), to be governed by the rules in relation to future estates in land.

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(3) The future estate attempted to be given to the brother and sisters is void under secs. 2038, 2039, Stats. (1898), since under the terms of the will the property could not be sold during the continuance of five lives in being at the creation of the estate.

(4) The estate attempted to be devised to the nephews, nieces, etc., of the testatrix is a contingent future estate, since the persons to whom it is limited must remain uncertain until the ceasing of the precedent estate. Such estate would also offend against secs. 2038, 2039.

(5) No part of the devise can be upheld.

2. Even a trust is void as creating an unlawful perpetuity if the trust term exceeds the period permitted by statute, where there is no power of sale and the statute—like secs. 2089, 2091, Stats. (1898)—forbids alienation by the trustee and the beneficiary during the continuance of the trust.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The appeal is from a judgment construing the will of Julia F. Adelman.

The cause was submitted on the brief of *Kleist, Bender & Lefebvre,* attorneys for the executrix, and *Tullar & Lockney,* attorneys for *Maggie Boyd,* and the brief of *William L. Tibbs,* attorney for the respondent.

TIMLIN, J. The executrix of the testatrix, upon filing her final account and asking for an assignment and distribution of the estate of the latter, also requested a construction of the will, particularly the second paragraph hereinafter set forth. The will was probably drawn by testatrix, a woman apparently of considerable acquisitiveness and versatility, who owned real estate, a stock of liquors and cigars, letters patent for an invention of hers, the copyright of a song, a theatrical wardrobe, paintings, shares of stock, jewelry, a diary containing "valuable ideas for patents and inventions," musical instruments, and a revolver. The will presents a queer compound of legal and epistolary expressions. The testatrix therein provided for a tombstone to be placed at her grave

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with the inscription, "Who tried to succeed," which might represent her efforts at will-making as well as her life work, and the "touch of nature" is found in the request that she be buried at Waukesha, Wisconsin, cemetery as near her mother as possible. The second paragraph of the will is as follows:

"II. I give, grant and devise to my father, *J. P. Meyer,* the income to be derived from the rentals of the following real estate situate in the city of South Milwaukee, Wisconsin, viz.: Lot (4) four, in block (5) five, and improvements thereon, in the original plat, and also lot (13) thirteen in block (31) thirty-one, and improvements thereon, to the amount of one hundred and fifty-six dollars annually, to be paid monthly in equal instalments, provided there shall be so much derived after deducting the costs of taxes, insurance and all necessary repairs and expenses of collecting and attending to the same as my executor shall deem to be reasonable, for the term of his natural life, and the surplus, if any, derived from such rentals, to be equally divided between the said *John Meyer, Lissie Flaherty, Maggie Boyd* and *Rosa Juden.* And I further direct that after my father's decease the rentals derived from said properties, Lots 4 and 13 aforesaid, shall be equally divided monthly between my said sister *Lissie Flaherty, Maggie Boyd, Rosa Juden* and my said brother *John Meyer,* after deducting costs and expenses of taxes, insurance, repairs and commission of two % for collections—but in case of the decease of either one of said four—then the monies so derived from the two said properties is to be equally divided among those that may be surviving at the time of my father's decease—And it is hereby provided further with reference to the two said properties, that after the decease of the said *John Meyer, Lissie Flaherty, Maggie Boyd* and *Rosa Juden,* said lots 4 Blk. 5, and Lot 13 Blk. 31 are to be sold and the monies derived therefrom divided equally among the children of said *John Meyer, Lissie Flaherty, Maggie Boyd* and *Rosa Juden,* and also my half brothers and sisters, children of *J. P. Meyer,* that may be surviving at that time, except that One Hundred & Fifteen Dollars shall be deducted from the share of my nephew Frank Chapleau, the amount of a bill he is owing me, unless the same shall have been paid at this

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time. It is hereby provided that if either of the buildings on said properties last mentioned should be destroyed by fire, before the death of the said four brothers and sisters above mentioned, then the insurance monies shall be used to rebuild the same."

The county court and the circuit court held that this paragraph of the will was void as contravening the law against perpetuities. Except as might be inferred from the nomination and appointment of an executrix to compound and settle any claim or demand against or in favor of the estate, there is no devise in trust of the lots mentioned in paragraph 2 or of the rents or income thereof. The appellants contend that by said paragraph several trusts are created independent of each other, each complete in itself, and that the disposition of property can be upheld without doing injustice and without defeating the intention of the testatrix by considering the paragraph in question to create several separable trusts under the rule of law declared in *Kennedy v. Hoy,* 105 N. Y. 134, 137, 11 N. E. 390. Alternately the appellants contend that that portion of the second paragraph which provides for the sale of the real estate there described after the termination of the life interests and the disposition of the proceeds of such sale to the then surviving children of *John Meyer, Lissie Flaherty, Maggie Boyd,* and *Rosa Juden,* and the half brothers and sisters of testatrix, should be upheld as a valid bequest, considering the same as a vested remainder to persons therein named, subject to a change so as to let in future-born children and exclude those dying before the termination of the life estates.

While it is true that equity will not suffer a trust to lapse for want of a trustee, still the omission of any devise in trust is to be considered with reference to sec. 2081, Stats. (1898). Uses and trusts, except as authorized and modified in ch. 96, Stats. (1898), are abolished. Sec. 2071. A trust may be created to receive the rents and profits of land and apply

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them to the use of any person during the life of such person, or for any shorter term; also, to receive the rents and profits of lands and to accumulate the same for the benefit of any married woman or for any of the purposes and within the limits prescribed in ch. 95, Stats. (1898); or for the beneficial interests of any person or persons when such trust is fully expressed and clearly defined upon the face of the instrument creating it. Nothing in the will of the testatrix brings it within these or any other provisions of statute, and there is no devise in trust to any person, so that it is not possible to find in the will one trust, much less several separate trusts. This part of the will of testatrix is rather governed by sec. 2060, which reads:

"Disposition of the rents and profits of lands, to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this chapter in relation to future estates in land."

We have here a disposition of the rents to *J. P. Meyer* during his life, and after his death to *Lissie Flaherty, Maggie Boyd, Rosa Juden,* and *John Meyer,* and survivor of them, during the life of the longest liver, and after the death of the last survivor the property to be sold and the proceeds of the sale to be divided equally among the children of the persons last named and her half brothers and sisters, children of testatrix's father, surviving at that time. The estate attempted to be devised to the latter group of nephews, nieces, half-brothers, and half-sisters belongs in that class of estates in expectancy denominated future estates. It is a contingent future estate because the persons to whom it is limited remain uncertain. Sec. 2037, Stats. (1898). There may not only be a dropping out of persons by reason of death before the time for vesting arrives, but also a coming in of others by reason of the birth of children, so that at no time between the death of the testatrix and the vesting of the contingent estate

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could it be known who would be ultimately entitled to this remainder, and it might ultimately become the property of some person now and within two lives in being and twenty-one years thereafter unborn.

In order to carry out the terms of the will so that the rentals should belong as therein provided, the property could not be sold within the lifetimes of *John P. Meyer, John Meyer, Lissie Flaherty, Maggie Boyd, Rosa Juden,* or either of them. The future estate in the rents and profits created in *Lissie Flaherty, Maggie Boyd, Rosa Juden,* and *John Meyer* would therefore come within the prohibition of secs. 2038, 2039, Stats. (1898), and the future estate created for children of the brother and sisters of testatrix and her half brothers and sisters would offend against these sections. *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *Patton v. Patrick,* 123 Wis. 218, 101 N. W. 408.

But the paragraph in question could not be saved from the condemnation of statute even by considering that it creates a trust, because that would merely bring us within the rule of secs. 2089 and 2091 and the cases construing these sections. Ordinarily a trust does not offend against the statutes relative to perpetuities where the trustee has a power of sale and the beneficiary may dispose of his interest, even though the trust term exceeds two lives in being and twenty-one years. But where there is no power of sale and the statute forbids alienation by the trustee and the beneficiary during the continuance of the trust, it does create an unlawful perpetuity when the trust term exceeds the period permitted by statute.

We find no way in which we can, consistently with the apparent intentions of the testatrix, save any part of this second paragraph of the will. The property described in that paragraph is not elsewhere in the will disposed of, and we agree with the judgment below that it should go as intestate property.

By the Court.—Judgment affirmed.

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RAULF, Respondent, vs. CHICAGO FIRE BRICK COMPANY and another, Appellants.

January 29—February 16, 1909.

Process: Proving falsity of return of service.

There is no fixed rule as to the quantum of proof required to establish falsity of an officer's return. Evidence reasonably, clearly satisfying the trier or triers that the return is false is sufficient.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to enjoin collection of a garnishee judgment.

The claim of the plaintiff upon which issue was joined was that a garnishee judgment was rendered against him in justice's court June 28, 1905, in defendant's favor; that the summons in the garnishee proceedings was not served upon him in any way; that he did not have any notice of either the judgment or the proceedings till June, 1907, when he seasonably commenced this action; that neither when the proceedings were commenced nor thereafter up to and inclusive of the rendition of judgment was he indebted to defendant in the action to which the garnishee action was incident save and except the sum of $7; that the justice was so informed before the judgment was rendered, and that the indebtedness was thereafter paid. The principal controversy was as to whether the return of the officer, that he made personal service on the plaintiff, was false. The court found all the material facts in plaintiff's favor.

For the appellant there was a brief by *Harry M. Sheets,* attorney, and *John A. McCormick,* of counsel, and oral argument by *Mr. Sheets.*

For the respondent there was a brief by *Perry & Kroesing,* and oral argument by *C. B. Perry.*

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MARSHALL, J. It is conceded that if the findings of fact stand the judgment must be affirmed. There is no question of law of any moment involved. Such questions as there are relate to the quantum of proof required to establish falsity of an officer's return. There is no fixed rule as to that. Evidence, reasonably, clearly satisfying the trier or triers that the return is false, is sufficient. It is the opinion of the court that this appeal is ruled in favor of respondent by the familiar principle that a court's conclusions of fact cannot be disturbed on appeal unless found to be against the clear preponderance of the evidence. The case does not require discussion of the evidence, and it is thought best to rest with this brief opinion.

By the Court.—Judgment affirmed.

COTZHAUSEN, Respondent, vs. DICK, Town Clerk, imp., Appellant.

January 29—February 16, 1909.

Drains: Special assessment: Restraining collection: Equity: Laches.

A landowner signed the original petition for the construction of a drain; was chargeable with knowledge of the proceedings in the laying out thereof and the apportionment of the cost to the persons benefited; had notice in fact of the assessment upon his property before the letting of the contract for the work; and did not appeal from such assessment but permitted the contractor to do the work in reliance upon the assessment as unassailed. His lands were benefited by the drain to an amount at least equal to the assessment. In an action to restrain collection of that or any other assessment against his lands on account of such drain he made no offer to pay any sum. *Held* that the action should be dismissed for laches and want of equity.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

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Action to enjoin sale of lands by county treasurer for delinquent drainage assessment, and also to require the appellant, *Dick,* town clerk, to expunge all records of the drainage proceedings and to perpetually enjoin him and his successors in office from placing on any future tax roll any assessment or tax growing out of said proceedings. The county treasurer, impleaded with the appellant, defaulted. The appellant answered. Plaintiff moved for judgment upon the pleadings, whereupon judgment was so entered, from which defendant *Dick* brings this appeal.

For the appellant there were briefs by *Perry & Kroesing,* attorneys, and *Quarles, Spence & Quarles,* of counsel, and oral argument by *C. B. Perry* and *T. W. Spence.*

W. C. Seefeld, for the respondent.

The following opinion was filed February 16, 1909:

DODGE, J. Without discussing many other obstacles to the entry of the judgment in this action upon the pleadings, it seems obvious that it must be reversed and the action against the county clerk dismissed by reason of laches and want of equity in the plaintiff. He instigated the drainage proceeding by signing the original petition. He was chargeable with constructive notice of the decision of certain commissioners on appeal directing that the drain be laid and requiring supervisors to proceed. This notice results from the statute requiring the filing of the decision of the commissioners in a public office. He was, too, chargeable with knowledge of the subsequent proceedings of the town supervisors in laying out and establishing the ditch and in making apportionment of the cost thereof to the parties benefited. He is alleged to have had notice in fact thereof and of the assessment upon his property before the letting of the contract for the work and, of course, before the doing of the work by the contractor. Besides which, it appears by the answer and is therefore admitted that plaintiff's lands are benefited to an amount at least equal to the assessment. He had a right to an appeal

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from that assessment, provided by statute, but did not exercise it. He knowingly permitted the contractor to do the work in reliance on the special assessment as unassailed. He makes no offer to pay any sum whatever. In such a situation a court of equity should not listen to the application of a property owner who has unprotestingly allowed others to expend money or labor upon an improvement which under some circumstances the authorities would have a right to make at his expense and from which he receives benefit, to excuse him from the payment of the portion assessed against his premises. *Schintgen v. La Crosse,* 101 Wis. 208, 214, 77 N. W. 167; *Beaser v. Barber A. P. Co.* 120 Wis. 599, 98 N. W. 525; *Lawton v. Racine,* 137 Wis. 593, 119 N. W. 331; *New York City v. Pine,* 185 U. S. 93, 22 Sup. Ct. 592.

For the reasons stated, the judgment as against appellant must be reversed. The other defendant not having appealed, we express no opinion as to his rights.

By the Court.—Judgment as against appellant, *William H. Dick,* is reversed, and cause remanded with directions to dismiss the action as against him.

A motion for a rehearing was denied April 20, 1909.

RASCHKE, Appellant, vs. HADERER and others, Interveners, Respondents.

January 29—February 16, 1909.

Life insurance: Mutual benefit society: Change of beneficiary: Supposed loss of certificate: Mistake.

Where one to whom a benefit certificate had been issued, in which his wife was named as beneficiary, substantially complied with all the requirements of the by-laws and rules of the association for proving loss of the certificate and for changing the beneficiary, and a new certificate was duly issued to him accordingly, the fact that the original certificate had not been lost but had been secreted by the wife did not affect the rights of the beneficiaries named in the new certificate, there being no question that the insured desired the change.

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APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The defendant Gegenseitige Unterstuetzungs-Gesellschaft, Germania, is a corporation organized exclusively for charitable and benevolent purposes for the purpose of extending mutual aid to its members and their families in cases of sickness, accident, and death. On January 22, 1894, this society issued its certificate No. 2306 on the life of August C. Raschke, a member, *Auguste Raschke,* his wife, being named as beneficiary. February 16, 1901, Raschke made application to the secretary of the society for the issuance of a life insurance certificate in place of the one issued in favor of his wife, to be payable, one fourth to each of his three children, one eighth to Walter Vick, his nephew, and one eighth to the person who should be the last attendant upon him prior to his death. He made affidavit before the secretary of the society, who was also a notary, that the certificate No. 2306, issued in favor of his wife, had been lost and could not be found. Upon this request and affidavit certificate No. 4837 was issued.

On November 5, 1905, while in good standing in the society, Raschke died. Due proof of his death was made to the society. When this action was brought by *Auguste Raschke,* the beneficiary named in the first certificate, the society paid the money due on the membership of Raschke into court and prayed that the beneficiaries named in the last certificate be made parties defendant. An order to this effect was entered by the court, and in due time a guardian *ad litem* was appointed for the minor children.

Besides the second certificate and the other records of the society showing its issuance there was evidence tending to show that the deceased and his wife had been on terms of difference for some time prior to the application for the substitute certificate, that she had commenced an action for divorce against him, that she had secreted the first certificate, which was in her possession, so that Raschke could not get it, and

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that Raschke knew that she had concealed it. The court found that the last certificate was properly issued and entered judgment dismissing the complaint, and, after deducting costs out of the fund, distributed one fourth of the balance to each of the three children named as beneficiaries, and the remaining one fourth to the executor of the last will and testament of the deceased, because Walter Vick was not a member of the family of the deceased and there was no one in attendance upon the deceased at the time of his death. This is an appeal from such judgment.

For the appellant there was a brief by *Schwefel & Knoell,* and oral argument by *H. G. Schwefel.*

For the respondent *Haderer* there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill* and *E. P. Nemmers,* guardian.

SIEBECKER, J. The court found that August C. Raschke on February 16, 1901, was a member of the defendant society; that a certificate had been issued to him which named the plaintiff, who was his wife, as the beneficiary; that he was entitled to exercise the rights and privileges of a member; that the constitution, by-laws, rules, and regulations of the association at this time provided that any member in good standing was entitled to make a substitution of beneficiaries in his certificate, and that this could be accomplished by indorsing a request therefor on the back of his certificate, subscribing the same, and delivering it to the secretary of the central society. If the certificate were lost, then such change of beneficiary could be made by proof of the loss of the original certificate by an affidavit subscribed before a notary and by releasing all claim under the original certificate; thereupon another certificate naming the substituted beneficiary would be issued upon payment of $1. It is further found that the deceased on February 16, 1901, in compliance with these requirements, made proof of the loss of his original cer-

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tificate and requested that another certificate be issued to him, naming his children, one Walter Vick, and the person last in attendance upon him at the time of his death as the beneficiaries; one fourth of the proceeds to be paid to each of the children, and one eighth each to Walter Vick and the person last in attendance upon him at the time of his death.

It appears that the original certificate was in plaintiff's possession at the time August C. Raschke died, and she now claims the right to recover the amount owing from the defendant on the certificate of insurance issued on his life upon the ground that the subsequent certificate, issued upon his request and naming the intervening defendants as beneficiaries, was improperly issued and cannot be made the basis for a recovery of the insurance due on the membership of the deceased. The evidence shows that the deceased substantially complied with all the requirements for changing the beneficiary in his certificate and proving its loss, and that the society properly issued another certificate of membership to him which named the intervening defendants as his beneficiaries in place of the plaintiff. There is no question but that the deceased desired to change the beneficiary in his membership certificate when he made affidavit therefor to the officer of the society and took the steps necessary to accomplish this purpose. Under these circumstances it is immaterial whether the insured obtained such change of beneficiaries through a mistake of fact as to the loss of the original certificate. It is manifest that he presented the necessary evidence to the society to entitle him to have such substitution made and to secure the second certificate which named the persons selected by him as beneficiaries. The trial court properly held that his children were each entitled to one fourth of the proceeds of the certificate, and that the remaining one fourth should go to the personal representative of the deceased.

By the Court.—Judgment affirmed.

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STATE EX REL. MCMANUS, Respondent, vs. BOARD OF TRUSTEES OF THE POLICEMEN'S PENSION FUND and others: SULLIVAN and others, Appellants.

January 30—February 16, 1909.

Policemen's pension fund: Statute construed: Disease is "injury:" Certiorari: ***What reviewable.***

1. Within the meaning of sec. 8, ch. 397, Laws of 1903—providing for retirement of a policeman who should be *injured* while in active service and thereby disabled,—and of sec. 9—providing for a pension for the family of one who should "die as the result of an *injury* received while in the line of his duty, as described in the preceding section,"—the contracting of a disease (in this case, pneumonia) is being "injured" and is the receiving of an "injury." So *held*, notwithstanding the law of 1903 in effect amended, so that it should read as above, an earlier law (ch. 265, Laws of 1899) which provided in sec. 9 thereof for a pension when death resulted from "an injury received while in the line of his duty or any disease contracted by reason of his occupation." MARSHALL, J., dissents.
2. A finding of fact by the board of trustees of the policemen's pension fund of a city, made within the jurisdiction of the board and upon evidence before it, cannot be reversed on *certiorari*.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Certiorari brought by relator, who had long been a contributor to the policemen's pension fund of Milwaukee and at the time of the relation was retired and pensioner thereon, to review the action of the board of trustees in awarding a pension to the appellant *Mary T. Sullivan* and her children, as the widow and children of the deceased, William L. Sullivan, at the time of his death a member of the police force. The board made due return, from which it appears that the pension was claimed on the ground that Policeman Sullivan contracted pneumonia by reason of exposure to which he was subjected in the course of a trip to New York to make an arrest.

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The return presents the record, which merely mentions the names of certain witnesses on behalf of the applicant and specifies the subjects on which they testified, but fails to contain such testimony. The testimony of certain other witnesses, apparently called in opposition to the application, is set forth in full, and the return shows a decision by the board, by majority vote, that the applicants are entitled to the pension according to the statute.

After the return an application was made by the three appellants to be admitted as parties defendant, because a reversal of the board's action would affect their interests, and they were so admitted, and attempted to raise various objections to the right of the relator to question the action of the board by *certiorari*. Such objections were overruled, and the trial court held that, even though it appeared by the record that the board had found that Sullivan died as the result of pneumonia contracted by him by reason of exposure to which he was subjected in the actual and active performance of duty as a policeman, the board were not authorized by law to grant him a pension, and accordingly entered judgment reversing their decision, from which judgment *Mary T. Sullivan* and her two children bring this appeal.

For the appellants there was a brief by *John Toohey* and *Walter H. Bender*, attorneys for *Mary T. Sullivan*, and by *J. L. O'Connor*, guardian *ad litem* for *Marie Antoinette Sullivan* and *Mark William Sullivan;* and the cause was argued orally by *Mr. Bender* and *Mr. Toohey.*

For the respondent there was a brief by *Doe & Ballhorn*, and oral argument by *J. B. Doe.*

DODGE, J. Brushing aside various obstacles of practice or procedure which are urged by the interveners to maintenance of this action as between the original parties, we proceed at once to a consideration of the real question involving the merits of the action; that is, whether pneumonia suffered and

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contracted in the line of, and by reason of, the active performance of duties assigned to a policeman is such an injury as entitles his widow to a pension if death results therefrom. The answer must be found by construction of secs. 8 and 9, ch. 397, Laws of 1903. That act, after making provision for the creation of a fund, partly by deduction from policemen's salaries and partly from other sources, and creating a board of trustees for the administration thereof, provides, in secs. 8 and 9:

"Sec. 8. If any member of the police department while engaged in the performance of his active duty as such policeman be injured, and found upon an examination by a medical officer ordered by said board to be physically or mentally permanently disabled by reason of such injury so as to render necessary his retirement from service in such department, such board shall retire such disabled members from service; provided no such retirement on account of disability shall occur unless the member has contracted such disability within the hours of each day or night when he is required to be on active duty by the rules of the department or while he is engaged in the performance of 'emergency duty' during his regular 'off hours.' . . .

"Sec. 9. If any member of such police department shall while in the performance of his duty be killed or die as the result of an injury received while in the line of his duty, *as described in the preceding section, . . .* " his widow and minor children, if any, shall receive a pension.

It will be observed that the right to retirement under sec. 8 and the right to a pension in case of death under sec. 9 are dependent on the condition under sec. 8 that the policeman "be injured," and under sec. 9 that he die as the result of "an injury;" and the question raised by relator is whether the contracting of disease is being injured and is the suffering of an injury within the meaning of this act. Sec. 9, by the italicised words, evidently refers back to sec. 8 for whatever of definition of "injury" may there be found. The word "injury," in ordinary modern usage, is one of very broad

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designation. In the strict sense of the law, especially the common law, its meaning corresponded with its etymology. It meant a wrongful invasion of legal rights and was not concerned with the hurt or damage resulting from such invasion. It is thus used in the familiar law phrase *damnum absque injuria*. In common parlance, however, it is used broadly enough to cover both the *damnum* and the *injuria* of the common law, and indeed is more commonly used to express the idea belonging to the former word, namely, the effect on the recipient in the way of hurt or damage, and we cannot doubt that at this day its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by any one. Hence, unless some reason to the contrary is presented, it should be so understood in these statutes. Subd. 1, sec. 4971, Stats. (1898). The respondent contends that, nevertheless, the word should be limited to the results of external violence. By itself the word "injury" or "injure" has no more application to the result of violence than to the result of any other injurious influence. A disease resulting from negligence of a physician in failing to give treatment is just as much an injury in common phrase as if it resulted from affirmative maltreatment or external violence. Therefore there is nothing inherent in the word to limit the injuries to which this statute applies to those from physical or external violence. If one be tortiously exposed to extreme cold he may suffer the freezing and consequent loss of a limb, or the chill of an internal membrane or tissue and resultant congestion or disease. No reason is apparent why either is more or less an injury than the other. In examining sec. 8 we find some suggestions in the context of the mental conception of the legislators in the use of the word "injured." In one phrase it is used in context and collocation with physical or mental permanent disability, and in another the legislators speak of such disability as one to be "contracted." These both point strongly to a conception of

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something other than external violence, which would ordinarily be said to be suffered or inflicted rather than contracted. The purpose of the act, too, would seem to require the broader meaning of the word. Why is not the policeman who, in the faithful performance of his duty, exposes himself to a danger like smallpox or diphtheria infection, as worthy of provision for his disability or for his widow as one who exposes himself to the knife or the club of a lawbreaker? Why is it not as promotive of the efficiency of the force for the protection of public welfare that he be encouraged in the one case as in the other? These considerations, and many others like them which might be mentioned, constrain us to the conclusion that the word "injury" is used in this statute in a sense broad enough to include the contracting of a disease, provided, of course, that such injury is suffered in the course of and by reason of the performance of the distinctive duties imposed upon the sufferer as a policeman (*Hutchens v. Covert,* 39 Ind. App. 382, 78 N. E. 1061), a fact which we deem to have been ascertained and decided upon sufficient showing by the board of trustees, although their record is not as full as it might be in its disclosure of the class of evidence which was submitted for their consideration. A provision in sec. 9 for a pension upon death for any cause after fifteen years' service marks a contrast or antithesis to this last requirement of causal connection between the active service and the injury, and does not signify a limited meaning in the word "injury" caused by the service.

In reaching the conclusion that disease is included we have not overlooked the fact, urged by relator, that an earlier statute (ch. 265, Laws of 1899, of which the law of 1903 was in effect an amendment) contained in sec. 9 both expressions, an injury received in the line of his duty "or any disease contracted by reason of his occupation," and that the latter words were eliminated in the law of 1903, having substituted therefor the words "as described in the preceding section."

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Notwithstanding this change, which doubtless is of some significance, it still seems to us that the injury described and provided for in sec. 8 was intended to include the inoculation with or contraction of disease, and that the new expression in sec. 9 was inserted in the act of 1903 for the purpose of perpetuating that meaning for the word "injury" in the latter section.

Our view as to the legislative intent results in the conclusion that it was within the power of the board of trustees to award the pension in question if they found that the pneumonia from which Sullivan died was contracted in the actual performance of his duties and caused thereby. Their resolution of that question of fact from the evidence before them was within their jurisdiction and cannot be reversed upon *certiorari*. *State ex rel. Manitowoc v. County Clerk,* 59 Wis. 15, 20, 16 N. W. 617; *State ex rel. Cook v. Houser,* 122 Wis. 534, 561, 100 N. W. 964.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the action of the board of trustees in granting pension to appellants.

MARSHALL, J. (*dissenting*). I cannot bring myself to concur in the decision of this case and will state briefly my reasons therefor.

The right result of the controversy here presented depends upon these familiar principles for statutory construction:

First. A legislative enactment should not be construed where there is no need for construction.

Second. There is no need for construction when the meaning of the enactment, in its plain, every-day sense, looking to words therein used, or looking at them in the light of the subject dealt with, is not involved in uncertainty.

Third. Where the meaning of an enactment is evident and leads to no absurd conclusion there can be no reason for refusing to attribute the meaning which the words signify; to

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go elsewhere in search of conjecture, in order to restrict or extend the act, would be to attempt to elude it. Such a method if once admitted would be extremely dangerous, for there would be no law, however definite in its language, which might not, by interpretation, be rendered useless.

Fourth. Judicial construction takes hold only when there is obscurity of meaning. So we must look first for uncertainty, not commencing to construe in advance of uncertainty appearing.

Fifth. All words of an enactment should be regarded as having been used in respect to some particular purpose.

Sixth. The plain, ordinary meaning of words should be regarded as having been the one intended, unless it appears, reasonably certain from the enactment, that some other meaning was intended.

Seventh. The legislative purpose when discovered, expressed within the reasonable scope of the language in an enactment, must prevail, regardless of consequences, and must be taken to be a part of the enactment the same as if expressed in the ordinary sense of words.

Let us now apply those rules to the enactment in question.

The original law is ch. 265, Laws of 1899. Sec. 8 was as follows:

"If any member of the police department shall while engaged in the performance of his duty as such policeman be injured and found upon an examination by a medical officer ordered by said board to be physically or mentally permanently disabled by reason of service in such department so as to render necessary his retirement from service in such department, such board shall retire such disabled member from service; provided, no such retirement on account of disability shall occur unless the member has contracted such disability while in the active service of such department." . . .

That was changed by ch. 397, Laws of 1903, by omitting "shall" before "while," interpolating "active" before "duty," and dropping the last of the quoted words, "while in the active

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service of such department," and in place thereof adding the words: "within the hours of each day or night when he is required to be on active duty by the rules of the department or while he is engaged in the performance of 'emergency duty' during his regular 'off hours'."

Sec. 9 of the original enactment was this:

"If any member of such police department shall, while in the performance of his duty, be killed or die as a result of an injury received in the line of his duty *or any disease contracted by reason of his occupation,* or if any member of such department, after fifteen years' service in such department, shall die from any cause whatever while in said service, or if any member of such department shall die from any cause whatever after having been retired upon a pension under the provisions of this act, and shall leave a widow or minor child or children under sixteen years of age surviving, . . ."

Note particularly that this section provides only for death while in the performance of duty, (a) by injury so received in the line of his duty, (b) disease contracted by reason of his occupation, (c) death in the service from "any cause," or (d) death from "any cause" after retirement upon a pension, leaving a widow or minor child or children under sixteen years of age.

The section was changed in the Laws of 1903 to this:

"If any member of such police department shall while in the performance of his duty be killed or die as a result of an injury received in the line of his duty, as described in the preceding section, or if any member of such department, after fifteen years' service in such department, shall die from any cause whatever while in said service, or if any member shall die from any cause whatever after having been retired upon a pension under the provisions of this act, and shall leave a widow or minor child or children under the age of sixteen years surviving, the said board shall direct the payment from said pension fund of the following sums, monthly, to wit:

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It will be noted that the changes were, first, by striking out after the words "in the line of his duty" the words "or any disease contracted by reason of his occupation," and second, by interpolating in place thereof the words "as described in the preceding section."

Thus the later act, unmistakably radically restricts the original law. Whereas, formerly, relief was afforded for disability occurring during the official term while the officer was in service on or off actual duty, unless on a vacation for some reason, now it is restricted to disability occurring within hours when, under the rules of the department, he is required to be actually on duty, or in case of an emergency. Formerly a pension was grantable to a dependent widow in case of death of the officer, her husband, from an injury in the line of duty as well as from death by disease contracted by reason of his occupation. Now the latter is not possible, the condition giving competency to the dependent for a pension being confined to death of the officer resulting from an injury occurring in the line of his duty as prescribed in sec. 8. The elimination of death from disease as creating such competency would seem to leave no reasonable ground whatever for holding that death from pneumonia, the circumstance relied on in this case, is retained.

I will not pay so little heed to what I believe to be ordinary understanding of ordinary persons, as to spend time demonstrating that while a disease as well as an injury may create damage, it is false logic to urge that an injury, in the ordinary sense, is a disease, or a disease is an injury in any other sense than that it injuriously affects the afflicted one, causing damage.

It would seem that the mere fact of legislative dropping out of "disease" as a cause of death creating competency of a dependent for a pension, under one of the rules for construction we have named, precludes the court from resorting to construction for the purpose of retaining it. It further

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would seem that such resort flies in the face of rule 3, that to construe that which has no need for construction is to use the function to construe to defeat the legislative intent rather than to discover and give effect to it.

Again, since the amended section only leaves death from injury sufficient to create competency of a dependent for a pension; an "injury" as that term is used in sec. 8, there can be no fair question but that it means a physical hurt, such as is commonly understood by the term "injury" when it is applied to a misfortune to a person engaged in an occupation involving extraordinary hazard as to receiving bodily wounds.

When we speak of a person as having been injured in the army or in railroad employment, or in the performance of duty of keeping the peace, or protecting society from criminal offenders, or apprehending such offenders, or in any other occupation exposing one to peculiar dangers as to bodily injuries, what do we mean by the term "injury"? In other words, what is its plain, ordinary meaning as applied to such situations? I venture to say the universal answer must be a physical hurt, a wounding of the body.

If the preceding be correct, to go beyond such common meaning into the field of broad general, or that of technical, sense violates the first, second, third, and fourth rules, and particularly the sixth, that the plain, ordinary meaning of words should be taken unless it appears reasonably certain some other was intended, and also the fifth, that all words of an enactment should be regarded as having been used in respect to some particularly indicated purpose. The latter because the element of elimination of the cause "disease" shows, manifestly, a purpose to exclude it and restrict the term "injury" to the particular purpose of providing relief to the dependent or dependents in case of death from "injury" as distinguished from death by "disease," as death from pneumonia.

The striking feature of the elimination of "disease" as a

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cause of death creating competency for beneficial participation of a dependent in the pension fund, seems to me to have been entirely nullified by the result of this case, rendering the whole manifest purpose of the amendatory act nugatory.

True, the term "injury" is broad enough to include anything which causes damage, but is that a warrant for departing from the common-sense, ordinary meaning as applied to the particular situation? The broad sense includes injury to reputation, injury to property, and injury to rights as well as injury to the person in the sense of a bodily wounding, but cannot one see, very clearly, that only in the latter sense is the term "injury" to a policeman in the course of his active duties as such, contemplated when the term is used in regard to such a person engaged in such service? If so, by what warrant can the court, merely because of the broader signification of the word, go into the boundless field, especially in view of there not only being nothing in the situation to suggest it, but such a purpose being expressly negatived by the legislative restriction by elimination of the very words which formerly included circumstances, somewhat within such broad field. In my judgment there is no such warrant, and so in my opinion the death involved here by "disease" should be regarded not only as not being within the act but as being expressly excluded from it, and so the order appealed from should be affirmed.

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SEVERA and wife, Appellants, vs. BERANAK, Respondent.

January 30—February 16, 1909.

Marriage of divorced person within year: Invalidity: Common-law marriage: Mutual benefit insurance: Who may be beneficiaries.

1. Within a year after his divorce a resident of this state was married in Illinois to another resident of Wisconsin. The laws of Illinois, like those of Wisconsin, prohibited such marriage. The woman knew the man had been divorced but did not know that their marriage was prohibited. She continued to cohabit with him as his wife in Wisconsin until his death more than a year after his divorce. *Held*, that there was no common-law marriage, and that the woman could not share as beneficiary in the proceeds of a mutual benefit certificate issued by a society whose by-laws did not authorize her, if not his wife, to be named as such beneficiary.
2. The fact that the insured was sick for several months prior to his death and was being attended to and cared for by his supposed wife during such illness did not bring her within a by-law of the society under which the insured might designate, as beneficiaries, "persons who are not related to him by blood, but who are dependent on him, or he on them, for their maintenance."

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.* They cited, among other authorities, 3 Am. & Eng. Ency. of Law (2d ed.) 960, 961; *Groth v. Central Verein,* 95 Wis. 140, 70 N. W. 80; sec. 2330, Stats. (Supp. 1906); 19 Am. & Eng. Ency. of Law (2d ed.) 1211, 1213, 1214; *State v. Tutty,* 41 Fed. 753; *De Wit v. Lander,* 72 Wis. 120, 39 N. W. 349; *Brown v. Gates,* 120 Wis. 349, 97 N. W. 221, 98 N. W. 205; *Wendel v. Durbin,* 26 Wis. 390; *Spencer v. Pollock,* 83 Wis. 215, 53 N. W. 490; *Williams v. Williams,* 46 Wis. 464, 1 N. W. 98; *Vinz v. Beatty,* 61 Wis. 645, 21 N. W. 787.

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John J. Vlach, for the respondent *Emilie Beranak,* cited, besides other cases, *Frame v. Thormann,* 102 Wis. 653, 79 N. W. 39; 1 Bishop, Mar. & Div. ch. 39; 3 Elliott, Ev. § 2486; 15 Am. & Eng. Ency. of Law (2d ed.) 1039; *Randall v. Kreiger,* 23 Wall. 137; 26 Cyc. 872; *Meister v. Moore,* 96 U. S. 76; *De Thoren v. Att'y Gen.* L. R. 1 App. Cas. 686; *Ballou v. Gile,* 50 Wis. 614, 7 N. W. 561; *Ledebuhr v. Wis. T. Co.* 112 Wis. 657, 88 N. W. 607; *Morrison v. Wis. O. F. M. L. Ins. Co.* 59 Wis. 162, 18 N. W. 13; Niblack, Ben. Soc. § 147; 3 Am. & Eng. Ency. of Law (2d ed.) 1083, note 4.

TIMLIN, J. The appellants are the parents of one Frank Severa, who died July 18, 1907, leaving life insurance for $1,000 in the defendant society. The following persons were designated as beneficiaries, viz.: *Emilie Beranak,* stated to be the wife of insured, $500; Felix Severa, a brother of insured, $200; John Severa, a brother of insured, $100; the appellants, parents of the insured, $100; and $100 for funeral expenses. Prior to the commencement of this action Felix and John Severa assigned their rights under said policy to the appellants. The insured was a divorced man, and within one year after his divorce and on August 2, 1906, married *Emilie Beranak* at Chicago, Illinois, although both he and *Emilie* were at the time residents of the city of Milwaukee and state of Wisconsin. The divorce laws of Illinois, like those of Wisconsin, at the time prohibited the marriage of divorced persons within one year from the time the decree was presented except in certain cases not relevant here, and also declared such marriage void. *Emilie Beranak,* although she knew the insured was a divorced man, did not know at the time she married the insured that there was any legal prohibition against said marriage, and after said marriage continued to cohabit with the insured as his wife in the state of Wisconsin up to the time of his death and after the expiration of one year from the date of the divorce, which

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was February 3, 1906. The by-laws of the defendant society provided as follows:

"The member shall designate the payment of his death benefit as follows: (1) To his family; (2) to his blood relatives; or (3) to persons depending on him, whom he shall designate in his application, stating the amounts payable to each. He shall designate the following persons as his beneficiaries: (1) His lawful wife; (2) his children, if they be dead to their children (his grandchildren); (3) his parents; (4) his brothers and sisters of whole-blood; (5) his brothers and sisters of half-blood; (6) his grandfather or grandmother; (7) his nearest relatives other than above mentioned; (8) persons who are not related to him by blood, but are dependent upon him, or he on them, for their maintenance; (9) to National Slavonic Subordinate Assembly and for Slovak national enterprises."

"If, for any reason, a member should not make a designation of his beneficiaries, or if such designation should become null and void, and if because of errors, or for other reasons, or if the designated beneficiary should die, then the benefit shall be paid one half (½) to wife and the other one half (½) in equal parts to the children; but where there are no children, one half (½) to wife and one half (½) to the parents of the deceased; and in case there is no wife, nor children, nor parents, then the benefit is paid to the legal heirs of the deceased."

The insured left no children. The society paid the money into court, and this contest is by the parents of the insured, the appellants, claiming in their own right and as assigns of the brothers of the insured and his heirs at law, against *Emilie Beranak*. The court below held on the foregoing facts that *Emilie Beranak* was the common-law wife of the insured and entitled to the sum of $500 out of the amount of $1,000 paid into court by the society.

It is only fair to the trial court to note that this ruling was made prior to the decision of this court in *Lanham v. Lanham*, 136 Wis. 360, 117 N. W. 787. According to the rule in the case last cited, *Emilie Beranak* was not in any sense the wife

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of the insured. The by-laws of the society, above quoted, did not authorize the insured to name her as a beneficiary. The conclusion that there was a common-law marriage between the parties under the facts aforesaid cannot be upheld. There was in this case no wife or children of the insured, and the benefit under the by-law, as we construe it, so far as the $500 of which *Emilie Beranak* was the designated beneficiary is concerned, went to the appellants, parents of the insured. The remainder they claim by express designation as beneficiaries and by assignment from the brothers of insured. There seems to be no provision in the by-laws for applying any part of the insurance for funeral expenses, and, if so, this would pass also to the parents of the insured as his legal heirs.

The judgment of the court below is further attempted to be supported on the fourth finding of fact, as follows: "Said Frank Severa prior to his death was sick for several months and was being attended to and cared for by said *Emilie Beranak* during his illness." This finding does not bring her within the by-law, "persons who are not related to him by blood, but who are dependent upon him, or he on them, for their maintenance," even if she were otherwise competent to take under this clause of the by-law.

It follows that the judgment of the circuit court must be reversed, and the cause remanded with directions to enter judgment upon the findings of fact in favor of the appellants.

By the Court.—Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

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UHLENBERG, Appellant, vs. MILWAUKEE GAS LIGHT COMPANY, Respondent.

January 30—February 16, 1909.

Actions: Limitations: Condition precedent: Notice of personal injury: Essentials: Municipal corporations: Defective streets: Primary liability of person not served with notice.

1. Notice of a personal injury resulting from defects in a street was served upon the city, reciting that the damage was caused by the city and that satisfaction was claimed from it. Action having been commenced against the city, it tendered the defense to a gas company on the theory that the latter had caused the defects, accompanying such tender with copies of the summons, complaint, and notice of injury. Plaintiff was nonsuited in the action against the city on the ground that the gas company was primarily liable, and then sued that company but did not serve upon it any notice of the injury. *Held*, that the notice served upon the city was not sufficient to fix liability upon the gas company, under subd. 5, sec. 4222, Stats. (1898), requiring the notice to be "served upon the person or corporation by whom it is claimed such damage was caused" and to state "that satisfaction thereof is claimed of such person or corporation."
2. For the same reason, the complaint in the action against the city could not serve as a notice to the gas company; and the tender of defense, besides not containing the essential recitals, did not meet the requirement of the statute that the notice should be "signed by the party damaged, his agent or attorney."
3. The fact that a statute provides that a notice shall not be insufficient or invalid solely because of inaccuracy or failure in stating certain things if there was no intention to mislead and no one is in fact misled thereby, indicates that in other respects the notice must substantially comply with the requirements of the statute.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This action is brought to recover damages for a personal injury. A wheel, broken from a hose cart, rolled against the defendant and injured him while he was standing on a street corner in the city of Milwaukee. Action was commenced by

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the service of a summons and complaint December 7, 1905, against the city of Milwaukee to recover damages for such injury. The accident happened July 13, 1905, and on July 21, 1905, notice of the injury was served on the city, pursuant to subd. 5, sec. 4222, Stats. (1898), such notice being addressed to the mayor and city clerk of the city, and claiming "satisfaction for said injury from the city of Milwaukee." Such notice recited:

"That the street in front of and along said Commerce and Walnut streets at and near the place where the accident occurred was out of repair and defective to the knowledge of the city of Milwaukee, and the hose cart upon which the said wheel was detached was defective, and that while the said hose cart was rapidly and with great violence running to a fire, the said wheel, on account of the said defective condition of the street and hose cart, became detached and rolled against the plaintiff, causing said accident and injury."

On February 3, 1906, the city of Milwaukee tendered the defense of the action to the *Milwaukee Gas Light Company,* on the theory that the defective condition of the street complained of was due to the failure of such company to restore said street to its former condition after having torn up the same to repair a leak in a gas main, and that said gas company was primarily liable for the injury sustained by plaintiff by reason of the defective condition of the street. The tender of the defense of the action was accompanied with a copy of the summons and complaint in the action and also a copy of the notice of injury served upon the city on July 21, 1905. The plaintiff was nonsuited in the action brought against the city, on the ground that the defendant in this action was primarily liable for the damages sustained. This action was commenced March 11, 1908, and more than one year after the accident occurred. The complaint alleges that the notice required by subd. 5, sec. 4222, Stats. (1898), was duly given to the defendant by reason of the service on said

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defendant, by the city attorney of the city of Milwaukee, of a copy of the notice of injury served on said city, together with a copy of the complaint in the action against the city, and of the tender of the defense in said action. The complaint alleges that "no other notice was served upon said defendant *Milwaukee Gas Light Company.*" The defendant demurred to the complaint on two grounds: (1) As not stating a cause of action; and (2) because the action was not commenced within the time limited by sec. 4222, Stats. (1898). From an order sustaining such demurrer plaintiff appeals.

The cause was submitted for the appellant on the brief of *Ernst A. Kehr.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *A. W. Fairchild.*

BARNES, J. The material part of subd. 5, sec. 4222, Stats. (1898), in so far as it affects the question before the court, provides that:

"No action to recover damages for an injury to the person shall be maintained unless, within one year after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation."

The statute further provides that the notice shall not be deemed insufficient solely because of any inaccuracy or failure in stating (1) the description of the injuries and (2) the manner in which they were received, or the grounds on which claim is made, provided there was no intention to mislead and the party was not in fact misled thereby.

It will be seen that the statute requires that the notice must be served upon the person or corporation by whom it is

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claimed such damage was caused and that it must state that "satisfaction thereof is claimed of such person or corporation." The notice here served recited that the city of Milwaukee caused the damage and likewise stated that satisfaction therefor was claimed from said city. Manifestly, if effect is to be given to the plain provisions of the statute, the notice was insufficient to fix liability upon the defendant. It not only fails to claim satisfaction from the defendant, but negatives the idea that damages are claimed from it by asserting that damages are claimed from another corporation. Neither is the notice addressed to the defendant, but to the city of Milwaukee. The statute declares that error or inaccuracy in stating certain things required to be stated in the notice shall not render it insufficient if there was no intention to mislead and the party from whom damages are claimed is not in fact misled. Such provision, however, does not extend to the requirement that the notice must be served upon the party from whom damages are claimed and must state that satisfaction for such damages is claimed of such party. The fact that the statute has provided that certain requirements thereof are not essential to the validity of the notice, where no one is misled and there was no intent to mislead, would indicate that its other provisions must be substantially complied with.

In *Smith v. C., M. & St. P. R. Co.* 124 Wis. 121, 123, 102 N. W. 336, this court said that, when the language of a provision of this statute relating to the manner of serving the notice was plain and unambiguous, "such provision is imperative and not permissive." Again, in *Hoffmann v. Milwaukee E. R. & L. Co.* 127 Wis. 76, 82, 106 N. W. 808, it was contended that the notice need not be given within one year in the case of a minor. The court rejected the exception sought to be interpolated into the statute, saying:

"The statute in question is clear and unambiguous, and, if its words be given their plain, obvious, and ordinary meaning, there can be no room for doubt that the legislature in-

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tended the statute requiring notice to be served within one year after the happening of the event causing the damage should apply to all persons. To give it any other construction would be to disregard the plain meaning of the statute."

It is manifest here that a plain and unambiguous provision of this statute has not been complied with. To hold the notice sufficient it would be necessary to eliminate a portion of the law by judicial construction. This court is not concerned with the merits or demerits, or the wisdom or lack of wisdom, in this law. If it is wrong the legislature should repeal it. It is not permissible for the courts to do so by a construction wholly at variance with the obvious meaning of the words used in the act.

The complaint in the action against the city of Milwaukee is not helpful as a notice, inasmuch as it is subject to the same infirmity as is the notice served on the city. The tender of defense made by the city attorney of the city of Milwaukee was not made by the plaintiff or by his agent or attorney, as required by said subd. 5 of sec. 4222, and in any event is barren of essential recitals necessary to constitute notice under the statute.

By the Court.—The order appealed from is affirmed.

WEISENBACH, Plaintiff in error, vs. THE STATE, Defendant in error.

January 30—February 16, 1909.

Criminal law: Assault with intent to kill: Conspiracy: Trial of one conspirator: Opening statement: Evidence: Resistance to arrest: Previous threats: Submission of lesser degrees included in charge: Instructions to jury: Intent: Presumptions.

1. If two persons assault another with design to feloniously take that other's life, and the claim of the prosecution is that such persons acted pursuant to a conspiracy, having for its purpose the offense attempted in aid of a further general purpose, and

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only one is placed on trial who denies being one of the two, and the identity of the other is established—all the circumstances of the conspiracy, and the various steps in its consummation tending to show motive for participation therein of the one on trial and to identify him as having been the participant and the general intent of such participation, may properly be given in evidence.

2. In the situation mentioned it is proper to state to the jury in opening the case on the part of the prosecution all facts the state expects to prove, as to the existence of the conspiracy, the connection of the accused therewith, particularly at the time of the offense, and to offer all legitimate evidence showing such circumstances, so far as they tend to establish guilt of the accused.
3. In such a situation, the fact that one participant has not been apprehended, does not militate, upon the trial of the other, against showing all the facts regarding the absent one bearing on the criminality of such other.
4. If a person, about to be apprehended as guilty of having committed a criminal offense, resists arrest, that may properly be established upon his trial as bearing on the probability of his guilt and given such weight by the jury as they may think it is entitled to under all circumstances.
5. If an attempt be made to arrest a person upon a charge of his having committed a criminal offense, and he successfully, by threats or intimidation, prevents being apprehended, and is informed that he will be visited later by a force sufficient to secure his submission, and he evinces a disposition to resist in such event, and upon a new attempt the officers are resisted by such person and a comrade, acting in concert with him, and to the extent of a claimed design to take the lives of such officers,—proof of the previous occurrence and threats are legitimate as to the intent of such resistance.
6. If a person is charged with a homicidal offense of a high degree, including lesser degrees, the case need not be submitted to the jury in any aspect other than such as there is evidence in some reasonable view to sustain.
7. In the trial of a person accused of having committed a homicidal offense of a character including a lesser offense, the court should instruct the jury as to every offense included in the charge established in any reasonable view by the evidence.
8. In the circumstances last mentioned, failure to charge as to any particular grade of offense, no proper request being submitted therefor, is not harmful error.
9. In such circumstances, an instruction requiring conviction of the higher degree or acquittal, is favorable rather than harmful to the accused.

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10. A requested instruction, embodying a correct rule of law but not applicable to the facts of the case, may properly be refused.
11. In submitting a cause to a jury involving a charge of assault with a dangerous weapon with felonious intent to take human life it is proper to instruct the jury that a man is presumed to intend the natural, probable, and usual consequences of his act, that being given so as to indicate it is not conclusive; only an evidentiary circumstance, to be considered in connection with the legal presumption of innocence and all the evidence bearing on the issue.
12. The fact that, in the given case, the reasonably to be expected result, as the usual and probable consequences of the act charged, did not occur, does not preclude giving to the jury the rule as to the inference of fact arising from the deliberate act

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

Plaintiff in error was duly convicted of the crime of assault with intent to murder. Exceptions were saved requisite to present for review the questions discussed in the opinion. The facts are there indicated, so far as necessary to an understanding of such questions.

W. H. Stafford, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, F. L. McNamara,* district attorney of Sawyer county, and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. McNamara* and *Mr. Messerschmidt.*

MARSHALL, J. The charge was that the accused, upon a particular day and at a particular place named, while armed with a deadly weapon, to wit, a rifle, feloniously assaulted five persons, named, with intent to murder them.

The general claim of the state was this: John Dietz resided on the banks of the Thornapple river in Sawyer county, Wisconsin, some sixty miles by the nearest usable traveled way from the railroad station at Hayward, the county seat, and in a wild and substantially uninhabited country; miles beyond

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the termini of public highways, and reached only by traveling through forests on rough roads, used principally by lumbermen, and passable, only with some difficulty, at the season of the year when the occurrence in question happened. There had occurred difficulties between him and a lumber company respecting conflicting claims as to property rights, leading to the commencement of actions, criminal and civil, against him, and his defying the officers of the law, refusing to submit to the jurisdiction of the courts, and insisting upon vindicating his claims by force to the extent of standing off officers of the law sent, in due course, with papers to serve on him and warrants for his apprehension, using deadly weapons for that purpose and evincing a determination to use them to kill rather than submit to the laws of the state as administered by its courts. Apprehending repetition of an expedition in force to arrest him, he associated the accused with him for the purpose of resisting the officers, and to the extent of killing them. On the 7th day of May, 1904, William Giblin and William Elliot, two deputy sheriffs of Sawyer county, departed from Hayward on an expedition to arrest Dietz, having a bench warrant, because of a previous defiance of the authority of the court, and a criminal warrant for a serious criminal offense in connection with the matter referred to. The first day they reached a stopping place, some forty-six miles from the starting point, leaving seventeen miles or thereabouts to be traversed before reaching the Dietz home, the way being over substantially unfrequented roads, through forests and rough uninhabited country, as before indicated. The next day they resumed the journey, accompanied by two employees of the lumber company with which Dietz was at war, and an employee of the farmer with whom they passed the night. The destination for the day was the lumber company's camp, near the dam which had been the subject of conflict, and near the Dietz home. The lumber company employees were on a return journey to camp. The farm hand went to drive and

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take care of the farmer's team which with his lumber wagon and tote rack was procured to make the balance of the journey. The lumber company had a team, which was hitched with the other one, making a team of four horses. The two company employees took the driver's seat and one of them did the driving. The two officers sat on bags of feed behind such seat and back of them was the farm hand. Traveling as indicated, armed with several guns, which however were not loaded, about 1 o'clock in the afternoon, at a point about three miles from the camp, Elliot observed a man hiding behind the stub of a tree, about fourteen feet from the road and to the rear, and called attention of his associates thereto. The man changed his position as the wagon proceeded, so as to keep the tree stub between him and range from the position of the men in the wagon. The wagon had not gone far, after the man was first observed, before he suddenly stepped into the open, instantly brought his rifle to his shoulder, yelled "Hands up, you sons of bitches!" and commenced firing. Instantly, after the first shot was fired, another man, armed with a rifle, stepped from hiding into the open, near the first one and, likewise, instantly commenced firing on the party in the wagon. Immediately after the first shot the horses broke into a run. The discharge of firearms continued as long as the receding party could be kept in range, many shots in all being fired. One bullet went through the farm hand's hat, just above the band, and he fell out of the wagon into the road. The men were recognized as Dietz and the accused, the former being the one who first commenced firing. Four bullets took effect in the wagon. One of the persons on the front seat was struck with two pieces of bullets, wounding him severely in the right forearm. He was struck also by a bullet which cut one of his suspenders below the buckle and grazed and left marks on his body. The party did not wait or go back for the farm hand. They went on, after regaining control of the horses, several miles to a logging camp away from the contemplated route

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and made no further attempt to execute the purpose for which they started. After the firing ceased two men approached Giauque, the farm hand, ordering him at the point of Dietz's gun to throw up his hands. They were in attempted disguise by blackening their faces, to some extent, and turning under their hat rims. After some altercation, Giauque was forced to return on foot to his employer's home, the accused, by Dietz's direction, running him down the road with the pointed gun against his back and kicking him several times and otherwise abusing him, commanding him to run under peril of being so filled with shot that he could not run and having his head blown off. In the meantime the accused had picked up a second gun, a shotgun, which was secreted behind a log near the location he occupied when the party first discovered they had been ambushed. As Dietz gave directions to the accused, he started on in pursuit of the officers, saying he would take across so as to head them off and get another shot.

Though a subpœna was duly issued to procure the attendance of John Dietz at the trial he was not produced. So far as appears the trial court and the jury were left to imagine why the one who appeared to be the dominant figure, in this most serious offense, was not present to testify. That it was not because he could not be found, sufficiently appears from the evidence. That it was not because, being served, he in contempt of authority refused to obey, further appears by inference. There is left, as the only inference, that by the hostile attitude of Dietz the officer with the subpœna was unable to make service upon him, without such peril of personal safety that he would not incur it. This situation must be considered with reference to some occurrences on the trial respecting which complaint is made. There was no dispute in the evidence but that the condition of things suggested, leading up to the shooting, existed, and no dispute but that the circumstance of the shooting and what followed as claimed, actually took place. The sole claim of the accused was that

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neither he nor Dietz was present at the time of the shooting nor participated therein. He testified that he was with Dietz at his home from some time in the forenoon till after the time the incident complained of was closed. There was evidence to the effect, directly or circumstantially, that he was Dietz's nearest neighbor; that they were almost daily associates; that he knew of the difficulty between Dietz and the lumber company and his attitude of defiance of the lawful authority of the state; that he was a single man, living alone on a homestead claim about a mile and a half from the Dietz home; that he was the possessor of a rifle and shotgun and was accustomed to do considerable work for Dietz and to be with him, armed on or in the vicinity of the dam; that on the morning after the shooting he drove two persons away who were approaching his cabin, by menacing them with his shotgun, having the idea, as he testified, of avoiding mixing up in the difficulty Dietz was in, and that on Monday after the shooting, at Dietz's request, he made a trip on foot to Phillips, a distance of forty-five miles, and obtained for him a stock of ammunition.

The foregoing somewhat lengthy statement of the state's claim, and the general character of the evidence in support of it, will suffice, without going into the evidence in detail. The claim made that the verdict of the jury is not supported by the evidence is without merit. The evidence seems ample at all material points to warrant the conclusion the jury reached.

Numerous exceptions were saved to remarks made by the prosecuting attorney in opening the case, such as referring to the existence of litigation between the Chippewa Lumber & Boom Company and Dietz, and to the sheriff, meaning, obviously, one of the deputy sheriffs, having at the time of the shooting a warrant, among others, for the arrest of Dietz for an offense upon one of the lumber company's employees, who was with the officers on the day of the shooting. Also to ref-

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erence to a circumstance that when officers, sent to apprehend Dietz, were eating their dinner at the lumber camp near the Dietz home, a shot was fired through the window, striking and breaking the arm of one Tracy. Complaint is made as to all such matters, and further, because the state asked two questions, which were not permitted to be answered, for the purpose of showing that when two deputy sheriffs went to arrest the accused he resisted by assault. Also because a question was asked of one of the deputy sheriffs, which was not permitted to be answered, as to whether the country adjacent to the Dietz place was not in terror of him and the accused, and questions, asked of another deputy sheriff, as to whether he did not inform Dietz that officers would be sent after him in sufficient force to capture him. Also because of a question to a witness called by the accused to impeach the statement of the witness Giauque, respecting whether John Dietz's brother William was not in strong sympathy with him in respect to the affair under investigation. Also because of a question, not answered, on cross-examination, put to a witness called to give the accused a good character as a peaceable and quiet citizen, as to whether he did not know the accused "was a member of John Dietz's outlaw gang." Also because the state's officer, in addressing the jury upon the evidence, said: "If John Dietz is that wronged man who has never committed a crime in his life, why isn't he here in the hall of justice?" to which objection was made because the officer who had been commanded to produce him upon a warrant could not get him. Whereupon such officer exclaimed in reply, "If you will admit that John Dietz is a lawless bandit that will be sufficient," to which counsel for the accused replied that, since all had been done that was practicable to secure the attendance of Dietz, the situation of the accused should not be prejudiced by referring to the circumstance of his absence. Also because the state's officer, in the course of his address, referred to John Dietz as an "anarchist" and the court declined to express any

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opinion as to the correctness of the remark, saying: "The jury can take his characterization of Mr. Dietz for what they deem it worth." Further, because the state's officer said to the jury: "John Dietz is behind this case," and the court refused to sustain an objection thereto, saying: "Counsel is arguing from circumstances which appear in evidence and the jury can consider it as they deem proper." And lastly because the state's officer said to the jury: "The state has chased all over the state for witnesses for the defendant," and the court declined to express disapprobation thereof further than to say, in effect, that though the state had not, perhaps, chased all over the state for witnesses in behalf of the accused, it had responded to his every request in that regard.

We have thus grouped all of the complaints made as to unfair conduct of the trial on the part of the district attorney and his assistant. They are all of the same general character and fall by one general reason.

Counsel was radically wrong in the idea that the circumstances leading up to the shooting, claimed by the district attorney to show a motive therefor and such connection of the accused therewith as indicated that he was a guilty participant with Dietz in a purpose to defend his supposed rights by force against the officers of the law as well as against the private party, were foreign to this case. They were a legitimate if not a necessary part of it. If John Dietz was a guilty participant in the shooting, then the accused was, if he was the second man present. There is no escape from that. Really, though John Dietz was not on trial, he was the most significant figure in the affair. Therefore, all circumstances now narrated leading up to the astonishing situation of one man with neighborly assistance, including the accused as was claimed, carrying on successful warfare with a great state, defying its laws, its officers, and its courts, culminating in the battle in the woods which ended, as the jury believed, and had a right to believe, without any great loss of blood, owing to

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want of deliberation and good marksmanship on the part of the accused and his associate and the distinction won by the officers of the law in the rapidity and success of their flight and their utter unpreparedness to meet the resistance they seemed to have anticipated they might meet before the expedition was over. John Dietz and his operations which so culminated were as much a part of the affair as participation of the accused therein. There was one single specific thing reaching from the origin of the trouble, furnishing motive for the attitude of lawlessness, through all the circumstances down to and inclusive of the final event, indicating intent to resist the administration of the law to the extent of taking of human life and participation of the accused in such intent. In the very nature of things, Dietz's name, his actions and operations could not properly have been kept out of the case. The history of the trial shows that the learned circuit court endeavored to do so up to the closing of the case to the jury, and, generally, in that respect, erred in favor of the accused rather than against him.

Perhaps it were better that reference to the shooting of Tracy had not been made. There was no evidence that Dietz did the shooting, or, if he did, that the accused participated therein, while if it had any connection with the particular offense, even as an evidentiary circumstance, it was quite remote. However, it was so consistent with the general state of things which resulted in the particular shooting, that we are unable to say that the district attorney did not honestly expect, when he referred to the matter, to introduce evidence in respect thereto, showing that it was a part of general warfare in which the accused was engaged and of which the shooting in question was a part and that it might be held competent, at least as bearing on the intent with which the firing on the officers occurred. Neither can we say but that the circuit judge might reasonably have supposed, at the time he ruled on the question, that, possibly, the circumstances re-

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ferred to might be so connected with the case as to be entitled to evidentiary consideration. No evidence was offered in respect to the matter, which may have been because, since the court evinced a determination in the course of the trial to exclude everything, except what occurred at the time of the shooting, the district attorney thought it would be futile to offer the evidence. On the whole, we are unable to denounce the occurrence as involving harmful error, if error at all.

The interrogatories, suggesting that the officers sent to arrest the accused were resisted, assaulted, and injured by him, which the court would not permit to be answered, are very far from the rule in *Buel v. State,* 104 Wis. 132, 80 N. W. 78, condemning the asking of questions which are clearly improper, for the evident purpose of creating prejudice rather than to elucidate the truth. It is evident that the district attorney supposed it was perfectly proper for him to prove that the conduct of the accused at the time of his arrest was inconsistent with innocence, in that he resisted the officers, as on the former occasion, assaulting and injuring them, and well the attorney might so have thought, as it was not only his right to make such proof, if the facts warranted it, but it was his duty to do so, if the evidence was at hand, or reasonably obtainable. Counsel say the questions were asked to create a false impression. How are we to know that? The witness was not permitted to answer. If the questions, unanswered, tended to create a wrongful prejudicial impression, counsel for the accused took the method best calculated to promote that situation. If the truth were, that the conduct of the accused at the time of his arrest was consistent with innocence, the proper way was for counsel to have put no obstruction in the way of proving it. Not only was no harmful error committed in propounding the interrogatories, but they were perfectly proper and the ruling in favor of the accused was wrong. Conduct of an accused person, evincing a disposition to evade prosecution, and especially when it

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goes to the extent of forcibly resisting arrest, is always considered an incriminating circumstance of more or less weight according to the circumstances, and proper to be considered by the jury. Wharton, Crim. Ev. (9th ed.) § 750.

The question asked of the sheriff of Sawyer county as to whether "the country was not in terror of those men," referring particularly to Dietz and his associate, perhaps had better not have been asked, though doubtless counsel honestly believed it was proper to show fully the attitude of John Dietz and his associates and the impression it had created on the people of the county, as bearing on the probable purpose of their ambushing the party on the occasion in question and the intent with which the shots were fired. It is pretty hard to draw an arbitrary line on evidence tending to establish a combination to commit an offense or to accomplish a general purpose, in aid of which a crime is committed, or such a line, particularly in such a case as this, respecting circumstances evidentiary of intent. The learned circuit judge, with the abundance of caution which characterized his conduct of the trial, refused to allow the question to be answered, but that does not even suggest that the asking of it was error. Had the court ruled the other way the field of competency is so broad that it is by no means certain the ruling would be condemned. However, we repeat, it were better that the question had not been asked and the jury left to infer the situation, such as it was, from evidence of circumstances bearing thereon.

It was by no means improper to show that just prior to the occurrence an officer had visited Dietz with papers for his arrest and failed to apprehend him, and admonished him that he would probably be called on by a force sufficient to secure his submission. The learned court was overcautious in ruling on that in favor of the accused. The fact, if it were a fact, that shortly before the occurrence in question the officers of the law were unable to apprehend Dietz and he was then

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informed that a more efficient force would be out after him, and he informed the officer, in return, that the threatened new force would meet with efficient resistance, were evidentiary circumstances explaining the purpose of Dietz and his associate in ambushing the officers as they did. It gives significance to the tactics of striking the party in the rear, so as to have them at the disadvantage sought by an assassin of striking his victim unseen and cutting off retreat as well.

The question asked, on cross-examination, of the witness called as to the character of the accused, better not have been asked just as it was, but like many other questions of which complaint is made, it was not permitted to be answered, and like many of them it was proper, in the main, and might well have been modified so as to remove any objectionable element. The use of the term "outlaw" was a little harsh, yet we are not prepared to say, in view of the facts disclosed, that it was entirely unwarranted. The witness, having testified to the reputation the accused had as a peaceable citizen in the community where he had resided for five years preceding the trial, and there being evidence strongly tending to show that the accused was in fact an accomplice of John Dietz in criminally defying the law, it was competent to ask the witness, for the purpose of discrediting him, whether the accused was not reputed to be such an accomplice, and that was the effect of the question.

It were perhaps better that the colloquy which occurred respecting the absence of John Dietz from the trial, notwithstanding the importance of his presence, if the testimony of the accused was true, had been tempered a little different, yet, we are unable to say it was not within the privilege of the prosecuting officer to say what he did. He was warranted in arguing from the evidence that Dietz was what he characterized him to be, and that the accused was his willing assistant on the occasion in question, and that the evidence which pointed to one as a criminal pointed just as certainly to the

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other, if not more; that absence of the latter from the trial, under such circumstances as to suggest contempt and defiance of the law, was an incriminating circumstance.

We will not further pursue the discussion, in much detail, of the numerous matters we have grouped together. There is no harmful error discovered in any of them. In general, the district attorney showed commendable care not to drag illegitimate matters into the case. We cannot see any indication of intent at any point to merely create prejudice within the calls of *Buel v. State,* 104 Wis. 132, 80 N. W. 78. Whatever digressions there were from the highest standard of propriety were not harmful, nor do they merit any special criticism. They were fairly within the broad privilege of the attorney, suggested in *Fertig v. State,* 100 Wis. 301, 75 N. W. 960. As regards the court's rulings, the accused certainly has no ground to complain, as we have seen. They were, in the main, in his favor when they might well have been otherwise, and when they were not they were not prejudicially against him. In the final winding up of the case by counsel to the jury the court was at least excusable in allowing the state's attorney to argue from the evidence that John Dietz was an "anarchist," and "was behind the defense." As before indicated, his connection with the transaction could not have been kept from the jury rightly or at all. Neither could the fact be kept from them that the acquittal of one was highly important to the other, and that the latter's friends were interested in and prominent in the former's defense.

The court properly refused to submit to the jury the question of whether if the accused was guilty of any offense at all it was of a higher grade than assault and battery. True, under a charge of assault with any specific intent, the latter element and the former combined, making an offense of a higher degree than the element of assault alone, there may be a conviction of the lesser offense only, if such only is the grade of guilt, in the judgment of the jury, beyond a reasonable

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doubt. That is elementary. The circuit court doubtless appreciated that and declined to charge the jury as requested, because in its judgment, in no reasonable view of the evidence, was the accused guilty only of assault and battery, or simple assault, if he participated in the shooting, as claimed by the numerous witnesses, and without contradiction, except by the evidence of the accused that he was not at the scene of the shooting, which the jury, of course, disbelieved and were well warranted in so doing.

In determining whether an instruction as to any lower degree of criminal offense, included within the one charged, should be given to the jury, the question is not solved by determining that the major includes the minor offense. Juries have no discretion in such cases. They cannot rightly convict of the lesser offense merely from sympathy or for the purpose of reaching an agreement. Conviction of the lesser degree must rest on evidence establishing the facts in that regard, and failing to establish the facts incident to a higher degree. So there must be the lesser offense included within the greater and there must be some reasonable ground on the evidence, in the judgment of the court, for a conviction of the former and not of the latter. *Hempton v. State,* 111 Wis. 127, 139, 86 N. W. 596; *Duthey v. State,* 131 Wis. 178, 182, 111 N. W. 222; *Montgomery v. State,* 128 Wis. 183, 197, 107 N. W. 14; *State v. McPhail,* 39 Wash. 199, 205, 81 Pac. 683; *State v. Bailey,* 31 Wash. 89, 71 Pac. 715; *State v. Wood,* 124 Mo. 412, 27 S. W. 1114. The law in this respect is well indicated by this language of the court in *State v. Wood, supra:*

"There was nothing in the evidence calling for an instruction on the lower grade for an assault to kill . . . and under such circumstances the court should not invite the jury to find for a lower grade than is made by the evidence."

We do not consider the assault, testified to have been committed on Giauque some moments after the shooting ceased

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and the offense the accused was charged with having participated in was fully consummated, was included in such charge. It was near to and closely connected with the shooting, yet was sufficiently separate therefrom as not, properly speaking, to be considered as included therein.

Under all the circumstances, it is the opinion of the court that, conceding the accused was at the shooting and participated therein, as the jury found were the facts, there was no reasonable escape from the conclusion that his act was more than mere assault and battery. So the requested charge was properly rejected. If the evidence would have warranted conviction of any offense within the whole charge less than the whole but greater than assault and battery, failure to submit it was not harmful in a legal sense, because not requested. *Cupps v. State,* 120 Wis. 504, 522, 523, 97 N. W. 210, 98 N. W. 546. Moreover, in such a case instruction requiring conviction of the higher grade, or acquittal, is rather favorable than harmful to the accused. *Fertig v. State,* 100 Wis. 301, 75 N. W. 960; *Dickerson v. State,* 48 Wis. 288, 4 N. W. 321; *Winn v. State,* 82 Wis. 571, 52 N. W. 775; *Odette v. State,* 90 Wis. 258, 62 N. W. 1054.

There has been no purpose in later years to displace the rule laid down in *Dickerson v. State, supra,* and upon due consideration and recognition of its want of harmony with some authorities elsewhere, in *Winn v. State,* 82 Wis. 571, 52 N. W. 775, declared to be perfectly logical and too well grounded in our jurisprudence to be doubted. It is not inconsistent with the rule in *Hempton v. State, supra,* and similar cases. In the *Hempton Case* the particular rule was recognized and affirmed. In the whole, the rule in homicide cases is that the better practice is for the trial judge to carefully scrutinize the evidence with the greatest care, view it in the most favorable light it will reasonably admit of from the standpoint of the accused, and, whether requested or not, submit the case to the jury on every phase of criminal homi-

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cide to which such evidence reasonably applies. Failure to submit on any such phase, if properly requested to do so, is harmful error, but failure, in case of there being no such request, is not harmful error. Moreover, such failure, without such request, characterized by explicit instructions that unless the accused is believed from the evidence beyond a reasonable doubt to be guilty of the higher degree he should be acquitted,—if error at all, is error favorable to the accused.

Complaint is made because the court refused to instruct the jury as to the bearing of want of motive. The request was to the effect that want of motive for a person to have committed the offense with which he is charged is a circumstance to be considered by the jury in connection with all other evidence in determining the issue respecting such charge. That is correct in the abstract. But it is not necessary for a court to submit to a jury a requested instruction merely because it states a correct rule of law. Does the case on the evidence reasonably require the instruction? That is the principal question, and unless the affirmative is true, rejection of the request is proper. Here the court, doubtless, thought such an instruction could not reasonably cut any figure, since it could not have any perceptible effect on the question of whether the accused was present at the shooting or not, and if he were then the motive for what occurred is so manifest that the jury could not reasonably have come to the conclusion there was none. Proof of motive is not indispensable to establish a criminal offense. Absolute want of motive does not necessarily raise or leave in connection with the legal presumption of innocence a reasonable doubt as to guilt, since the crime, including the essentials of guilt, may be inferred from the act itself and consequences, if they are the natural and probable effect of the act. *Cupps v. State, supra; Pointer v. U. S.* 151 U. S. 396, 14 Sup. Ct. 410; *Clifton v. State,* 73 Ala. 473; *McLain v. Comm.* 99 Pa. St. 86, 99. In doubtful cases the evidentiary effect of want of motive may be of much

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and perhaps controlling significance, and an instruction in respect thereto ought always to be given, and refusal to give it upon proper request would be harmful error; but where the evidence is such that motive is perfectly apparent to any one of common sense, or the offense is established with requisite clearness and the connection of the accused therewith as well by direct and positive evidence, an instruction on the subject of motive may or may not be given in the discretion of the court.

The requested instruction that a mere formal charge of, and placing one on trial for, a criminal offense is not evidence of guilt, was amply covered by the plain and full charge as to the presumption of innocence.

A requested instruction as to the burden of proof and the degree of certainty of guilt to warrant a conviction, was sufficiently covered in the general charge, and the same is true as to several other requests which need not be referred to in detail.

A request was made to instruct the jury to the effect that, in order to warrant a conviction, it is necessary for the state to prove by evidence beyond a reasonable doubt that the defendant maliciously and deliberately formed an intent to kill "one or more persons named in the information and that he with such deliberately formed intention" attempted to effectuate it. So far as that states good law it was included in the general charge. It was properly rejected for the iteration and reiteration of the words "deliberately formed intention," which are not used in our statutory offense of murder in the first degree, instead of the words "premeditated design," which are so used. *Cupps v. State,* 120 Wis. 504, 97 N. W. 210, 98 N. W. 546.

Complaint is made because the court said to the jury: "You are instructed that a man is presumed to intend the natural, probable, and usual consequences of his act." That is about as familiar a principle of law as we have. *Cupps v. State,*

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supra; Clifford v. State, 58 Wis. 477, 17 N. W. 304. It is not conclusive and was not so given to the jury. In close connection therewith the jury were carefully instructed on the subject of reasonable doubt and the legal presumption of innocence and were, in substance, told that, viewing the whole situation as disclosed by the evidence, unless they reached a conclusion beyond a reasonable doubt that the accused fired upon the party with a design to take human life, or his associate so fired with such intent with the knowledge and participation of the accused in his criminal act and purpose, they should acquit him. So the presumption from the act of shooting was given only its legitimate evidentiary effect, an effect rebuttable by other presumptions and circumstances, direct and circumstantial.

Had the instruction complained of been given in such a way as to lead the jury, reasonably, to believe that the act and purpose of shooting with the natural and probable result to destroy human life, necessarily, established, as a matter of law, the essentials of intent to commit the crime of murder; that the intent was not a fact in controversy to be established by evidence, the same as the act alleged to have been characterized by the intent,—the situation would be different. So the contention supported by numerous authorities that the specific design to take human life must be established by evidence and not left to depend upon a presumption of law, is beside the case. True, it is to be so established, but the natural inference of fact arising from the act is evidence of the purpose thereof, to be considered with all other evidence bearing on the question, and in no other sense was the instruction given.

The contention of counsel that the principle embodied in the instruction has no application except in case of the natural and probable consequences actually occurring, which has support in *State v. Dolan,* 17 Wash. 499, 50 Pac. 472, is illogical in the extreme. True, effectuation of the act

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heightens the force of the inference, but is not indispensable to its existence, from the very reason of the rule. The inference arises from the element of "natural and probable," though the result which ought reasonably to have been foreseen as probable, may not have happened because of some circumstance perfectly consistent with the purpose that it should happen. To illustrate, suppose the accused fired twice, directing his aim first to one of the party attacked and with fatal result, and second to another without such result, could there be any doubt but that the inference of intent would arise in the latter as well as in the former instance? The doctrine laid down by the Washington court is quite novel. An examination of the authorities relied on shows that they were, as it seems, misapprehended. In a later case, *State v. Romano,* 41 Wash. 241, 83 Pac. 1, where the consequence was not death, the instruction condemned in *State v. Dolan, supra*, was approved, while not applied, and a not very successful attempt was made to distinguish the two cases. The former was substantially overruled. A concurring opinion went upon the ground that the early rule was bad law. The false logic of it was aptly illustrated by Justice RUDKIN, saying: "I think the portion of the charge excepted to is a correct statement of a familiar principle of law, and is applicable in every case where the question of intent is involved." Citing *Comm. v. Webster,* 5 Cush. 295; *Allen v. U. S.* 164 U. S. 492, 17 Sup. Ct. 154; 1 Greenl. Ev. § 18, and other authorities. Referring to the logic of his brethren, who omitting to profit, as it appears, by the opportunity to return to a correct rule, resorted to the doubtful method of distinguishing between situations where there is no substantial difference, he said: "I do not care to indulge in any such refinements, but vote for affirmance on the broad ground that the instruction excepted to embodies a correct statement of the law as to any and all of the crimes charged."

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Some other criticisms of the charge are made, but it is the opinion of the court that they are not of sufficient merit to warrant more than this incidental mention.

This closes a review of all errors assigned with as much detail as seems required. Some matters have not been mentioned at all and others only in a general or incidental way, but all have received the study which the importance of the case would seem to demand. The case was ably tried by the court and by counsel on both sides, and, in our opinion, justice has been vindicated. The case developed a most astonishing situation, respecting successful defiance of the lawful authority of the state, which fully warranted the learned trial judge in strongly characterizing the accused and his confederate at the time of passing sentence as guilty, in addition to the offense charged, of a highhanded defiance of the law of the land equivalent to open war with duly constituted authority. That does not, as we view it, evidence prejudice on the part of the learned judge, and give color to the conduct of the trial as prejudicial to the accused. It was a deliberate judicial expression on the case as it appeared when ready for judgment, given after restraint, upon personal views, which had been very marked in favor of the accused, and when such restraint not only was no longer necessary, but the situation of having successfully defied the law, as appeared to the judge, could properly be pictured as a preface to the sentence to be passed, and a subject for reflection to any one concerned.

By the Court.—The judgment is affirmed.

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STATE EX REL. ROSENHEIN vs. FREAR, Secretary of State, and another.

February 22—February 24, 1909.

Supreme court: Original jurisdiction: Taxpayer's action: Restraining illegal disbursement of state moneys: Constitutionality of statute, when not determined: Powers of state legislature: Investigations: Incurring of expenses: Creating "debt:" Public purpose: Judicial tribunal: Primary election law.

1. The supreme court, in the exercise of its original jurisdiction, may entertain an equitable action to prevent the secretary of state and state treasurer from disbursing state moneys for illegitimate purposes; and such action may be initiated by a taxpayer if the attorney general refuses to act.
2. The constitutionality of a legislative act will not be considered by the court unless a decision in respect thereto is essential to the determination of some controversy calling for judicial solution.
3. The legislature has a broad discretionary power to investigate any subject as to which it desires information in aid of the proper performance of its legislative function or of any other act delegated to it by the fundamental law, state or national; and to that end may proceed by a duly authorized committee of one or both houses, and may incur reasonably necessary expenses, payable out of the public funds.
4. The workings of the primary election law for the selection of party candidates for the office of United States senator, including the conduct, legitimate or illegitimate, of persons voted for or voting at such election, as bearing on the policy of retaining or amending the law or the advisory force of its result in the given case, is a proper subject for legislative inquiry, whether the law is valid or not.

[5. Whether the primary election law (secs. 11—1 to 11—28, Stats.) so affects the discretion of members of the legislature, under the federal constitution, respecting the election of United States senators as to be invalid, and whether it infringes the right of public assembly and consultation for the public good, guaranteed by sec. 4, art. I, of the state constitution, not determined.]

6. A legislative inquiry broad enough to embrace the policy of primary election laws in general cannot be regarded as a mere attempt to administer a void law, even though the particular statute whose workings are to be investigated may be void.

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7. A resolution providing for a legislative investigation in aid of ordinary legislative business does not create a "debt" within the meaning of sec. 8, art. VIII, Const., relating to the passage of any law creating a state debt.
8. A statute providing that the expense accounts of a legislative investigation shall be audited by the secretary of state upon the certificate of the chairman of the investigating committee stating the facts, does not confer any auditing authority upon such chairman or violate sec. 2, art. VI, Const., making the secretary of state the state auditor.
9. A legislative investigation instituted for the purpose of securing information for legislative guidance is within the domain of public purpose and general interest, as distinguished from private purpose and from a mere political party purpose and interest, even though it may have political aspects and be dominated by members of one political party.
10. A legislative investigating committee charged with the duty of gathering and reporting information for legislative guidance is not a judicial tribunal within the meaning of sec. 2, art. VII, Const.

PETITION by a taxpayer to commence an action in this court for the purpose of preventing payment of expenses out of the state treasury incurred, or that may be incurred, by a joint committee of the legislature, under a resolution clothing such committee with authority to investigate the manner in which the primary election of party candidates for the office of United States senator to be chosen by the legislature of 1909 was conducted, and any alleged improper conduct of candidates voted for at such election, and to report the evidence taken and the committee findings. The application was heard on the relator's petition and the proposed bill of complaint, and upon notice to the secretary of state, the state treasurer, and the attorney general, and the matter was presented at the bar of the court by C. F. Lamb and Hon. J. Elmer Lehr, attorneys for the relator, and the deputy attorney general for the defendants.

In addition to the matters, in due form pleaded, showing legal capacity to sue and jurisdiction to entertain the case,

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conditioned upon grounds sufficient to warrant the relief prayed for appearing in the bill, the following claims are appropriately set forth in such bill as satisfying the call for such grounds:

(1) The primary election law, as regards the nomination of party candidates for the office of United States senator, violates several clauses of the constitution of the United States, and particularly sec. 3, art. I, requiring United States senators to be elected by state legislatures, and that such primary election law, in its purpose and effect, takes from the state legislature the absolute discretion in respect to such elections lodged in the members thereof by the fundamental law.

(2) The resolution forming the sole basis for the proposed expenditures is void, because thereby it is proposed to incur state indebtedness in the administration of an unconstitutional primary election law.

(3) The said resolution is in contravention of the state constitution (sec. 8, art. VIII), in that it purports to create a state debt, and the question upon its passage was not taken by yeas and nays entered upon the journal of the assembly, and it does not appear that three fifths of the members elect of such assembly were present at the time the question was taken.

(4) The act to provide for payment of the proposed expenditures confers auditing power, as to the committee accounts, on the chairman of the committee, and requires the secretary of state to formally audit such accounts upon such chairman's certification of their correctness, contrary to sec. 2, art. VI, of the state constitution.

(5) The resolution attempts to authorize expenditure of public money for private purposes contrary to constitutional limitations in respect to that subject.

(6) The resolution purports to authorize expenditure of public money in support of an illegitimate judicial tribunal, contrary to sec. 2, art. VII, of the state constitution.

(7) If any reason ever existed for the proposed expendi-

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ture of public money, it ceased to exist before the investigation was authorized.

(8) The resolution, in effect, calls for the use of public money for political party purposes.

(9) The primary election law violates sec. 4, art. I, of the state constitution, guaranteeing the right of public assembly and consultation for the public good.

C. F. Lamb and *J. E. Lehr,* for the relator.

Russell Jackson, deputy attorney general, for the respondent.

PER CURIAM. The foregoing covers all matters of any possible moment stated in the bill. The court takes the application for leave to use the original jurisdiction of the court, deciding the preliminary question of judicial power, and passing beyond that, further matters being regularly reached, to and deciding the question of propriety of granting the application, resting the result on the sufficiency of the bill in all respects as if it were challenged upon general demurrer.

The court is of the opinion:

First. If the secretary of state and state treasurer were about to take such action as to disburse state moneys for illegitimate purposes, it would be within the competency of this court, in the exercise of its original jurisdiction, to entertain an equitable action to prevent it on the initiative of a taxpayer, the attorney general refusing, on proper request, to act in the matter.

Second. Sound judicial policy precludes the court from considering the question of the constitutionality of a legislative act unless a decision respecting its validity is essential to the determination of some controversy calling for judicial solution.

Third. The legislature has very broad discretionary power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to

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make or unmake written laws, or perform any other act delegated to it by the fundamental law, state or national, and to proceed, with that end in view, by a duly authorized committee of one or both branches of the legislature and to incur reasonably necessary expenses, payable out of the public funds.

Fourth. The workings of the primary election law for the selection of party candidates for the office of United States senator, including the conduct, legitimate or illegitimate, of persons voted for, or voting at such election, as bearing on the policy of retaining or amending such law or the advisory force of its result in the given case, is a proper subject for legislative inquiry independently of whether the law is valid or not. Such expenditure is not to be regarded as incurred in the administration of an unconstitutional law.

Fifth. The result of the second and fourth points in this opinion is that no emergency is now presented requiring the court to determine whether the primary election law so affects the absolute discretion conceded by counsel to have been lodged with the members of the legislature by the national constitution respecting the election of United States senators as to be invalid, and therefore the court leaves such question undetermined and without intending to cast any doubt whatever upon the validity of the law. The same is true as to whether the law infracts the right of public assembly and consultation for the public good guaranteed by sec. 4, art. I, of the state constitution.

Sixth. In any event, the resolution cannot be regarded as a mere attempt to administer a void law, because it is broad enough to cover the field of legislative inquiry respecting the policy of such laws, regardless of whether the particular one is valid or not.

Seventh. A legislative investigation duly authorized in the course and in aid of ordinary legislative business does not create a debt within the meaning of sec. 8, art. VIII, of the state constitution, requiring, upon the passage of any law cre-

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ating a state debt, the question to be taken by yeas and nays, three fifths of all the members elected to the house in which the taking occurs being present, and the vote to be entered upon the journal. The term "debt" as used in such section refers to matters of the sort mentioned in the preceding sec. 6, not to mere ordinary legislative expenses.

Eighth. The act appropriating money to defray the expenses of the investigation does not violate sec. 2, art. VI, of the constitution, making the secretary of state the state auditor, because it requires the expense accounts to be audited as provided by sec. 127, Stats. (1898), which provides for the auditing of like expenses by the secretary on a certificate of the chairman of the committee of the facts to which the legislative fee bill is to be applied in the given case. No auditing authority, strictly so called, is thus conferred upon the chairman of the committee.

Ninth. The purpose of the investigation being to obtain information for legislative guidance, it is public, not private.

Tenth. A legislative investigating committee charged with the duty of gathering and reporting information for legislative guidance is not a judicial tribunal within the meaning of the constitution.

Eleventh. A legislative investigation, regularly instituted, for the purpose of securing information for legislative guidance, is within the domain of public purpose and general interest, as distinguished from a mere political party purpose and interest, though it may have political aspects and be dominated by members of one political party.

The foregoing covers all matters of moment suggested by the bill, and the result is that such bill does not state facts sufficient to constitute a cause of action for the interference sought, and therefore the application must be denied.

The application is denied.

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WILL OF MCNAUGHTON: FRAME, Executor, and another, Appellants, vs. PLUMB and another, by guardian *ad litem*, Respondents.

FRAME, Executor, and another, Respondents, vs. PLUMB, by guardian *ad litem*, imp., Appellant.

November 11, 1908—March 9, 1909.

(1) *Witnesses: Competency: Transactions with persons since deceased: Officers of corporations.* (2–4) *Constitutional law: Vested rights: Remedies: Change in rules of evidence.* (5) *Appeal: Affirmance: Majority not concurring as to error.* (21) *Rehearing: Inaccuracies.* (6–20) *Trusts: Expenses of litigation, from what funds payable: Guardians* ad litem: *Compensation: Necessary expenditures: Estates of decedents.* (22) *Corporations: Officers: Effect of resignation.*

1. Ch. 197, Laws of 1907, respecting the competency of officers of a corporation to testify, deals with the status when the person is offered as a witness.
2. One cannot acquire a vested right in a judicial remedy unless it is of the contract so that an invasion of the remedy necessarily impairs the property right.
3. The exception noted does not apply to a mere rule of evidence which leaves other rules, ample to establish the remedial right by competent witnesses.
4. It is competent for the legislature to prescribe a rule of evidence as by ch. 197, Laws of 1907, applicable to transactions which happened prior to the enactment, but incompetency of a witness resulting may be avoided by removal of the condition upon which it is based before the person affected is offered as a witness.
5. On appeal from a judgment, unless there is a concurrence of a majority of the participating justices in support of at least one material ground of error, the judgment must be affirmed of necessity.
6. Generally speaking, it is improper for a court to adjudge or order paid out of trust funds the expenses of litigation of a defeated party respecting such fund except to the extent of his interest in the fund.
7. In general, representatives of owners of a trust fund have no authority to stipulate away the subject of the trust in payment of costs and expenses of litigation respecting the fund, and any such stipulation should not be recognized by the court as a basis for an order or judgment.

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8. Without plain legislative authority a trust fund should not, in any case, be depleted to pay the expenses of litigation in respect thereto of a person who has no interest therein.
9. The legislature may make reasonable regulations for compensating out of a trust fund a representative, such as a guardian *ad litem* of an infant, required to be made a party to litigation, for his services and necessary expenditures, regardless of whether the infant has any interest in such fund.
10. In judicial proceedings to settle an estate, infant parties must be represented by guardians *ad litem*, regardless of any statute; moreover, the court rules require it.
11. A proceeding to settle the estate of a deceased person is in the nature of an action *in rem*, and all parties interested in order to be bound are required to be made parties.
12. In such proceedings adult persons are interested in having infant parties properly represented, as without that such adults could not safely possess themselves of the fund whether it belonged to them or not, hence the basis for depleting the fund to pay the expenses of such representatives regardless of whether the wards have any interest in the fund.
13. Compensation for services of a judicial assistant, such as a guardian *ad litem*, in the conservation of a trust fund, should be limited to the reasonable value of somewhat similar services in official life.
14. The rules before stated having been well established prior to the enactment of ch. 267, Laws of 1907, it is presumed the legislature intended the measure of compensation to be the one established by judicial policy.
15. The law referred to leaves the court broad discretion as to whether to allow compensation or not and the amount gauged by the judicial rule.
16. The provision to the effect that the allowance must be fixed by the court in which the litigation is had is a limitation of authority.
17. A judgment against the ward for costs is not a liability of the guardian *ad litem*. Payment thereof by him is not, under ordinary circumstances, to be recognized as a necessary expenditure of his.
18. The words "payment can be directed by the court" limit the right of direction to property *in custodia legis*, leaving the balance, if any, allowed, collectible out of the property of the ward as his debt.
19. The allowance is not required to be taxed after the manner of taxing costs. It may be fixed in any way within judicial discretion.

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20. In a proceeding to fix the allowance of a guardian *ad litem* he does not represent the ward. Whether in such cases the ward should be represented or left wholly to be protected by the court without assistance, not decided.

[Syllabus by MARSHALL, J.]

On motion for rehearing:

21. Inaccuracy in statements of fact in an opinion by this court is not ground for a rehearing where it did not affect the result.

22. Even where the charter of a corporation provides that its officers shall hold until their successors are elected and qualified, or appointed and qualified, the resignation of an officer without any acceptance thereof vacates the office for all general purposes unless acceptance is specially required by the charter.

APPEALS from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Modified and affirmed.*

Cross-appeals from a judgment of the circuit court on appeal from the county court of said county admitting to probate an instrument purporting to be the last will and testament of Elizabeth McNaughton.

Proceedings to establish the will were instituted in such county court October 2, 1906. Therein *Ina Jane Plumb* and *John Clyde Plumb,* minors and the heirs at law of the deceased, represented by their guardian *ad litem, D. S. Tullar,* an attorney at law, contested the will upon the ground that the testatrix at the time of its execution was not of testamentary capacity and that it was procured by fraud and undue influence exercised by the representatives of the principal beneficiary. The proceedings in the county court were brief, resulting in the will being allowed. An appeal was seasonably taken to the circuit court for Waukesha county. The guardian *ad litem,* with the approval of the circuit court, employed Ernst Merton, a duly qualified attorney at law, to assist as counsel. Such court May 11, 1907, directed the special administrator, no executor having been yet appointed, to pay out of the estate $300 to enable the guardian *ad litem* to obtain the attendance of witnesses upon the trial. The pro-

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ponent and person named as executor appealed to this court and prevailed upon the ground that there was no law authorizing the direction.

The trial occupied some eight days, thirty-eight witnesses being sworn. It resulted in favor of the proponent.

The will was executed June 13, 1904, at the residence of the testatrix, she signing the same with her own hand and it being witnessed by Ray Briggs and Margaret McNaughton, the latter being a distant relative and a member of the family of John D. McNaughton, in a part of whose residence the testatrix had made her home for many years. She, after making a few small bequests, among them $2,000 to John D. McNaughton, expressed as for fifteen years' services and board and $100 additional for each year she might live after the date of the will, and $100 to each of the grandchildren, willed the residue of her estate, which proved to be somewhere around $35,000, to the trustees of *Carroll College,* a denominational school of the United Presbyterian Brethren, a church society with which the one she belonged to affiliated. She died about two years and two months after the will was made.

There was considerable conflicting evidence as to the testamentary capacity of the testatrix at the date of the will. The opinion evidence, of which there was much on the part of the contestants, was from nonexperts, based upon their observation of the testatrix for a considerable length of time before the will was made. The general nature of contestant's opinion evidence is fairly indicated by that of Mrs. Vanderpool. On direct examination she said in substance this: I lived on the place formerly belonging to the McNaughton family, of which deceased was a member. She lived there many years ago. I knew her for some thirty-five years before she died and was accustomed to see her frequently in the later years of her life. I visited her in 1892 when she was sick. Her mind was then not just right. She seemed to see objects in

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a false aspect. After that I met and conversed with her. She would feel of my dress as if it was new to her and inquire if it was new when in fact she had seen it many times. She visited me at the old place and went about the yard apparently delighted to be there. She inquired about the condition of things existing when she resided on the farm, such as a flower bed and a fence around the garden, without seeming to appreciate how long a time had elapsed since she went away. She visited the place again in 1905 and was then unable to carry on a conversation. She was very forgetful and would reiterate some simple incident over and over again, unmindful of the fact that she had before related it. In my opinion she was not at the date of the will of sufficient mental capacity to comprehend perfectly the condition of her property, her relations with the persons worthy to be the objects of her bounty, and the meaning of the paper she signed for a will. On cross-examination the witness said, in 1905 Elizabeth realized that she was forgetful and spoke of herself disparagingly on that account. In 1903, while she recollected the condition of things on the farm as they existed thirty-five years before, she would forget matters of very recent occurrence. She was never reputed to be much of a talker. I never talked with her about business.

A part of the opposing evidence was by Dr. Kempster, an expert on mental diseases, who testified to this effect: The paralysis which afflicted the testatrix some over two years before she made the will was not such an affliction as to affect the mind after her physical recovery. Mere forgetfulness in old age, called senility, is loss of brain function; not inconsistent with comprehension of property interests and pecuniary obligations. Such mere senility is not the brain disease sometimes afflicting aged persons and called senile dementia. A person from mere senility might forget some things, such as the names of friends and children, but would not be likely to forget to collect moneys due as principal of loans or interest

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thereon. Advanced senility would be indicated by failure to collect interest for fourteen or fifteen years, but the habit of taking certificates of deposit for money received from time to time and placing them in a safe lock box and keeping them there, and declarations of the party that she would not loan any more on mortgages because she did not want to be bothered with such matters nor collect interest upon certificates of deposit because of not understanding it and not wanting to be bothered, at the same time as money came in from loans depositing the same in the bank and taking certificates of deposit and preserving them as aforesaid, would indicate good capacity to take care of property. The evidence of the doctor related to circumstances established by the evidence or in respect to which there was evidence warranting a finding of their existence. There was evidence that the testatrix had allowed accrued interest on her certificates of deposit to remain uncollected for many years and that there was the same habit during her sister's lifetime, when she, acknowledged to be of good business capacity, attended to such matters for both. There was also evidence to the effect that Elizabeth at times indicated by what she said that she did not comprehend the amount of her property or did not wish to have others know of her circumstances.

She was eighty-two years of age at the time of her death. She was a maiden lady, and for many years prior to 1889 resided on a small farm with Jane Ann, her sister, also a maiden lady, the property interests of the two, as before indicated, being looked after in the main by the latter. Both of the sisters during their declining years showed a strong inclination to devote their property, in the main, to charitable purposes. In 1889 they went to live at the home of John D. McNaughton, where the testatrix died. About a year after such residence commenced Jane Ann died. From that time up to substantially Elizabeth's death, she, with some assistance, looked after her property, which was mainly in the form

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of securities, some being secured by mortgages on real estate and some being in certificates of deposit in the Waukesha National Bank, of which *Andrew J. Frame,* a trustee and the treasurer of *Carroll College* and the person who drew the will, was largely the owner and was the president. She had a safe lock box in the bank where she kept her papers and uninvested money, no one having access to the box but herself. She had a stroke of paralysis some over two years before the will was made, from which she never wholly recovered. It weakened her mentally and physically and was somewhat progressive from the time it occurred until she died. *Carroll College,* located at Waukesha, Wisconsin, was an incorporated institution having a board of trustees required by the organic law of the institution to be elected for specific terms, those in office to hold until their successors were elected and qualified. It has a president, secretary, and treasurer. *Andrew J. Frame* for many years before the will was made had been one of the trustees of the college and its treasurer. He was a person in whom the testatrix placed unbounded confidence as regards such business matters as she was accustomed to do with the bank. Dr. Carrier was the president of the college, whose duty it was, among other things, to secure such beneficences to the institution as he reasonably could. In a conversation with *Mr. Frame* he learned of the existence and circumstances of Elizabeth. Shortly thereafter, accompanied by W. L. Rankin, another trustee of the college, he visited her for the purpose of obtaining pecuniary favors to the institution. Before meeting her the two visitors were informed by the McNaughtons, who knew the purpose of the visit, that Elizabeth was growing childish. They importuned her for a contribution to the institution, but not being successful, agreeable to her views they promised to have *Mr. Frame* see her and talk the matter over. Later Dr. Carrier wrote Elizabeth a letter in which he informed her he had explained matters to *Frame* and made suggestions calculated

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to influence her in favor of the college upon religious grounds. Some two months thereafter Dr. Carrier and *Mr. Frame* visited Elizabeth. Prior thereto and after *Mr. Frame* was informed by Dr. Carrier that Elizabeth wanted to see him, he was informed by a second messenger from her to the same effect. Upon this second visit Carrier met her first and suggested that she make a will in favor of the college. She then said she had been thinking of giving the college $200. He suggested that she wait and talk the matter over with *Frame* and then left the two together to discuss the matter. According to *Mr. Frame's* story she told him what Dr. Carrier wanted and expressed what her preferences were, saying that she desired to make another will and to give John D. McNaughton $2,000, and otherwise stating her wishes, which were later embodied by *Mr. Frame* in the instrument which she executed as her will. After she made her wishes fully known to *Mr. Frame,* she handed him $100 to deposit in the bank on certificate of deposit and took his receipt to hold until she visited the bank and obtained the certificate. On the return trip *Mr. Frame* informed Dr. Carrier the result of the visit. Shortly after this occurrence *Mr. Frame* again visited Elizabeth with the instrument ready for execution. She then suggested some changes which were interlined in the typewritten draft. There was evidence tending to show that the witnesses signed the paper in her presence and in the presence of each other, and that she subscribed her name thereto in their presence. *Mr. Frame,* by Elizabeth's direction, took the will when he returned to Waukesha, the understanding being that she would soon visit the bank and take her old will from her safety deposit box and destroy it and place the new will therein. That understanding was carried out. The old will was taken by Elizabeth from the box and *Mr. Frame* destroyed it in her presence and at her request. At the same time she made a deposit of $40 in the bank, treating the same as usual. From that time she occa-

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sionally visited the bank up to near the time of her death. There was evidence tending to show that during the two years and two months intervening between the making of the will and Elizabeth's death she did considerable business and conferred favors upon some persons whom she thought worthy thereof, and that she did the business relying more or less upon assistance by others as she had before making the will. There was evidence which, taken by itself, strongly suggested that she was a weak-minded person, incapable, unaided, to do business and not comprehending the magnitude of her property or the proper manner of taking care of the same. There was other evidence tending to prove a contrary condition.

There was further evidence to the effect that in the will destroyed as aforesaid, which was made in 1892, she made the same provision for the contestants as in the later will, and after making some small gifts, including one to *Carroll College,* the residue of the estate was given to several boards of the Presbyterian Church and *Mr. Frame* was named as executor. The sole proof of what occurred between Elizabeth and *Mr. Frame* was given by himself. It was to the effect that she acted upon her own judgment throughout. All his evidence in that regard was objected to under sec. 4069, Stats. (1898), as amended by ch. 197, Laws of 1907. The objection was overruled upon its appearing that he had resigned his position as trustee and treasurer of the corporation in order to qualify himself to testify. The court in reaching a conclusion depended largely on *Frame's* evidence, holding that in the absence thereof such conclusion could not be reached.

The decision was to the following effect: At the time the will was made Elizabeth was fully capable of making a testamentary disposition of her property and did so of her own free will. She was not unduly influenced by *Mr. Frame* and Dr. Carrier, or either of them. The will was executed in all respects according to law and is entitled to probate. The

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guardian *ad litem* of the infant contestants is entitled to be paid out of the estate $454.45 as disbursements and $3,000 for services in the litigation. Judgment was rendered accordingly.

For the executor and the residuary legatee there were briefs by *Frame & Blackstone,* attorneys for the executor, and *Quarles, Spence & Quarles,* attorneys for *Carroll College;* and the cause was argued orally by *H. J. Frame* and *T. W. Spence.*

D. S. Tullar, guardian *ad litem,* and *Ernst Merton,* of counsel, for the minor contestants.

The following opinion was filed December 15, 1908:

MARSHALL, J. As indicated in the statement, *Mr. Frame* was not an officer of the college when he testified. So he was a competent witness respecting what occurred between himself and the testatrix, as regards the disability of corporate officers to testify under ch. 197, Laws of 1907.

The statute deals with the condition when a witness is offered. Though *Mr. Frame* was competent respecting the transaction he testified to till after the commencement of the litigation, it did not prevent him being rendered incompetent before the trial by a statute passed in the meantime, but he could thereafter restore his competency by surrendering that which interfered therewith, as he did. One cannot acquire a vested right in a judicial remedy unless it is of the contract so that the invasion of the remedial element necessarily impairs the contract (*Second Ward Sav. Bank v. Schranck,* 97 Wis. 250, 73 N. W. 31; *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488, 76 N. W. 359; *Eau Claire Nat. Bank v. Macauley,* 101 Wis. 304, 77 N. W. 176), or otherwise divest vested rights (*Rich v. Flanders,* 39 N. H. 304).

The first two cited cases are within the first exception. So it was held that a law injuriously affecting the remedial element affected the value of the principal thing, contrary to the

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inhibition of the national constitution (sec. 10, art. I) as to any state passing a law impairing the obligation of contracts. That is distinguishable from a mere change in rules of evidence, not necessarily affecting any property right, although rendering a right more difficult of establishment, or incapable of being established at all because of the parties being without competent evidence, there, however, being left ample rules by which such right could be established if competent witnesses were at hand. *Besson v. Cox,* 35 N. J. Eq. 87; *Karney v. Paisley,* 13 Iowa, 89; *Westerman v. Westerman,* 25 Ohio St. 500; *Rich v. Flanders, supra; Southwick v. Southwick,* 49 N. Y. 510; *Talladega Ins. Co. v. Landers,* 43 Ala. 115; *Calderwood v. Calderwood's Estate,* 38 Vt. 171; *Wood v. Kaufman,* 135 Mich. 5, 97 N. W. 47; *Clark v. Harper,* 215 Ill. 24, 74 N. E. 61; *Mitchell v. Haggenmeyer,* 51 Cal. 108; *Kenney Presbyterian Home v. Kenney,* 45 Wash. 106, 88 Pac. 108; *Crawford v. Halsted,* 20 Grat. 211.

The plain applicability of the citations is indicated by the following:

"The statute does not relate to or impair contractual rights or vested property rights, but it relates to the remedy and declares a rule of evidence. There appears to be no vested right in any mere rule of evidence." *Kenney Presbyterian Home v. Kenney, supra.*

Rules of evidence "are at all times subject to the modification and control of the legislature . . . and the changes which are enacted may be made applicable to existing causes of action, even . . . where retroactive laws are forbidden." *Crawford v. Halsted, supra.*

In relation to a law affecting qualification of a witness which was passed pending the suit, "it is enough that the witness is competent when offered." *Talladega Ins. Co. v. Landers, supra.*

A statute may change mere rules of evidence, and although it applies to cases in which the cause of action accrued and

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the rights became vested prior to its passage, it is constitutional, though a statute affecting rules of evidence, and in fact divesting vested rights, would be unconstitutional. *Rich v. Flanders, supra.*

We now pass to the dominant subject on contestants' appeal, it being understood that we give such weight to *Frame's* evidence as we severally consider it is entitled to, regarding it as having been properly received.

With due regard, it is thought, for the conclusions of the trial judge on questions of fact, we have reached here conflicting results. The most careful consideration, which it seems could be well given to the matter by each, has not enabled a majority to arrive at harmony respecting the two principal assignments of error, as to facts, presented for consideration. The Chief Justice, Justice DODGE, and the writer are not able to see that clear preponderance of evidence against the trial court's conclusion on either the subject of testamentary capacity of the deceased at the time the alleged will was made or that of undue influence in producing the will, justifying a disturbance of the findings complained of. Justices KERWIN and TIMLIN are able to see such clear preponderance on both questions. Justice SIEBECKER agrees with them on the last but not the first, while Justice BARNES agrees with them on the first but not the last. A situation so extraordinary rarely occurs in judicial work. That it should move judicial minds to exhaust all reasonable efforts for harmony, as it has in this case, is most natural. The situation, while peculiar in a high degree, is nevertheless not new, as the following citations will show: *Legal Tender Cases,* 52 Pa. St. 9, 101; *Browning v. State,* 33 Miss. 47, 87, 88; *Cook v. Drew,* 3 Stew. & P. 392; *Bell v. Morrison,* 27 Miss. 68. The rule adopted in the most pronounced of those cases and highly commended as sound in *Lipscomb v. State,* 75 Miss. 559, 624, 23 South. 210, 230, seems to be the only logical one, though one case found in the books (*Smith v. U. S.*

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5 Pet. 292, 303) proclaims a different doctrine, but without assigning any reason therefor or its having been subsequently followed by the federal court, so far as we can discover. The view which we adopt is that a majority must agree on some one specific ground of error fatal to the judgment or it must be affirmed. Otherwise there would be a reversal without any guide for the trial court upon a new hearing. Unless the trial judge changed his mind, the result would be the same as before and a like result as formerly would happen on a second appeal, and, as said by HANDY, J., in his opinion in *Browning v. State, supra,* and highly commended, as before indicated, in *Lipscomb v. State, supra,* "such would be the strange and anomalous attitude of the case, *ad infinitum,* as often as it should be tried below and brought here on the same state of facts."

The foregoing does not leave anything which need be said on contestants' appeal.

We have left to consider the objection raised by proponents to the allowance of $3,000 as compensation for the guardian *ad litem* and $454.54 for his disbursements, all to be charged against the body of the estate, except $200. If authority to make such allowance at all exists it is by virtue of ch. 267, Laws of 1907. Generally speaking, it must be conceded that no inherent power exists in courts to take the property of one person and devote it to the benefit of another, and that the legislature cannot, legitimately, authorize such proceeding, as by taking the property of the successful party in litigation to pay the expenses incurred by his adversary in the controversy.

This court, in harmony with general authority, has said with reference to judicial dealing with a trust fund, that no part thereof belonging to one should be used to defray the expenses of another; that in case of compensating a guardian *ad litem* in addition to taxable costs, it should be done out of the infant's property under the control of the court. *Tyson*

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v. Richardson, 103 Wis. 397, 401, 79 N. W. 439; *Stephenson v. Norris,* 128 Wis. 242, 263, 264, 107 N. W. 343. The court has condemned in unmeasured terms the practice, which obtained at one time, of treating a trust fund under judicial control as open to be depleted by judicial direction to compensate persons for their expenditures in litigation in respect thereto in hostility to the real owners. *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786; *Fox v. Martin,* 108 Wis. 99, 102, 84 N. W. 23; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *Stephenson v. Norris,* 128 Wis. 242, 263, 107 N. W. 343. Such use of property has been characterized as wholly without justification in the absence of legislative authority and as "trenching closely upon that forbidden act of depriving one of his property without due process of law or taking property from one for the private benefit of another." *In re Donges's Estate,* 103 Wis. 497, 516, 79 N. W. 786.

So plainly does such interference with a trust fund, without some valid written law authorizing it, shock the sense of justice, that this court has felt called upon to refuse to give effect to stipulations of attorneys for all parties to the litigation to the contrary in case of the parties being minors (*Fox v. Martin, supra*), and applied the same rule as to power of trustees, generally, to stipulate away part of the subject of the trust and obtain judicial approval thereof (*Becker v. Chester,* 115 Wis. 90, 147, 91 N. W. 87, 650). So, as will be seen, about the last, so far as of judicial creation, of a bad practice has been swept away; a practice which, probably, as suggested in *In re Donges's Estate, supra,* became engrafted upon our jurisprudence through consent of counsel in individual cases till it came to have the appearance of judicial sanction as a rule of justice, overlooking the plain wrong of taking the property of one without his consent for the benefit of another, as if the mere circumstance of that property being temporarily *in custodia legis* gave a judicial trustee greater power in that regard than any other, while in fact, from a

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moral standpoint, it should render the property safely removed from such danger. Not a vestige of the infraction which once received approval is left in our system, with the narrow exception noted in *In re Donges's Estate, supra,* which seemed to have some basis in reason and to be so firmly entrenched by a long line of decisions as not to appear properly removable without legislative assistance, other than the element restored by legislative interference under the law before referred to, upon which the contestants rely, and a prior law (ch. 397, Laws of 1901), both of which were designed, as appears, to avoid the result of *In re Donges's Estate, supra,* keeping within the reason thereof as to the legitimate basis for diversion of trust property.

We do not abate at all condemnation of the practice, so far as it is dependent upon judicial policy alone, expressed in *Becker v. Chester, supra,* pp. 147, 148, 91 N. W. 651:

"The whole practice of inviting litigation by allowing parties to indulge in judicial controversies involving trust funds at the expense thereof, regardless of whether such parties win or lose, is pernicious and should not be encouraged by any judicial rules. A careful reading of the *Donges Case* must convince any one that such was the view of this court when that case was decided. That view has rather been strengthened than weakened by efforts to have the rule declared by the court liberally construed, minimizing its effects as regards the injustice it was intended to prevent. All such efforts must fail. We incline to a strict rather than a liberal construction of the rule."

The court declines to be responsible for any practice which would tend to invite litigation and render property testamentarily disposed of a probable prey of those who have no interest therein or those who unjustly seek to enhance their interest.

In the face of judicial policy thus clearly and repeatedly declared, the law in question was passed. With its mere legislative wisdom; that which is within the field of legislative

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supremacy, we have nothing to do. So far as it does not transcend constitutional limitations, it must be unhesitatingly administered. So far as experience by such administration shall show that it was unwise, the same power that enacted it will, doubtless, remedy the mischief. In any event, there rests the responsibility, as does the *responsibility* for things which courts at times are criticised for by the inconsiderate, who cannot, or do not, discriminate between power to make law and power to declare and administer it.

The theory of the statute is, and correctly too, that a proceeding to administer an estate is in the nature of one *in rem*, the *res* being for the time being *in custodia legis*. Woerner, Am. Law of Adm'n, *500, *501. It requires the presence, actually or by representation, of all parties interested or who may be interested whether *in esse* or not. Those who by reason of infancy cannot appear for themselves must be represented by guardians *ad litem* in order to be bound, whether there is any statutory requirement in that regard or not. *O'Dell v. Rogers*, 44 Wis. 136. It is the duty of the court to see that its wards are represented regardless of any written law. Moreover, the court rules impliedly make provision therefor. Stats. (Supp. 1906), p. 1120. It is the duty of parties interested to call the court's attention to the necessity therefor and they are vitally interested in the duty being performed. The guardian *ad litem* must be an officer of the court, an attorney duly admitted to practice and competent to protect the rights of the minors, and competent to respond in damages for negligence or misconduct in the discharge of his duties as an assistant in the administration of justice. Circuit Court Rule IX; *Tyson v. Richardson*, 103 Wis. 397, 399, 79 N. W. 439. The position of guardian *ad litem* is an important one. The obligation to accept the trust and to faithfully discharge the duty regardless of compensation is an incident of the profession of law and the lawyer's official station. It is for the court to see that such duty is performed.

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So while there is the judicial function of exacting the strictest fidelity on the part of the appointee and encouraging him to that end in every practicable way, there is the correlative duty to see that the faithful servant and officer does not go without a reasonable pecuniary reward for his labor so far as there is property of the ward under the control of the court, or otherwise, out of which it can be paid by direction of the court (*Tyson v. Richardson, supra*), or the ward's debt, as in fact it is (*Smith v. Smith,* 69 Ill. 308, 312; *Walton v. Yore,* 58 Mo. App. 562), can be collected, or there is a fund under the control of the court which, or a party before it who, should equitably bear the burden, under established rules or written law on the subject.

It will be thus seen that guardians *ad litem* are as essential to parties interested adversely to the infant as to the latter, since only by use thereof could they succeed, safely, if at all, to the subject of the proceedings. So it has been held that compensation to the guardian *ad litem* on some basis,—even if it turns out that the infant has no interest in the subject matter,—payable primarily out of the infant's property, if he has any, whether presently under control of the court or not, otherwise out of the fund conservable only by his presence, or by the parties, requiring for their own interest that the infant be called into the litigation, such basis not permitting any onerous burden and in some jurisdictions being so confined as to assimilate to taxable costs and called such. *Weed v. Paine,* 31 Hun, 10; *Yourie v. Nelson,* 1 Tenn. Ch. 614; *Carter v. Montgomery,* 2 Tenn. Ch. 455; *Union Ins. Co. v. Van Rensselaer,* 4 Paige, 85, 87; *Gott v. Cook,* 7 Paige, 521, 544; *Att'y Gen. v. North Am. L. Ins. Co.* 91 N. Y. 57; *Kerbaugh v. Vance,* 5 Lea, 113; *Holloway v. McIlhenny Co.* 77 Tex. 657, 662, 14 S. W. 240; *Walton v. Yore,* 58 Mo. App. 562; *Walker v. Hallett,* 1 Ala. 379; 2 Hoff. Ch. Pr. 74.

These and many other authorities that might be referred to are to the effect that under no circumstances should com-

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pensation be allowed to an unsuccessful guardian *ad litem*, payable out of a fund under control of the court, in excess of taxable costs, or a sum in the nature thereof, as taxed between party and party, in the absence of special legislative authority. All recognize the right of the legislature to reasonably pursue such a fund in such a case. The great weight of authority goes to the full length of our adjudications that, without legislative authorization, no compensation whatever can be allowed to an unsuccessful guardian *ad litem* standing for an infant contestant of a will, or any party, similarly situated, payable out of the general fund or any part of it not belonging to the infant. *Wallon v. Yore, supra; Jones v. Yore,* 142 Mo. 38, 47, 43 S. W. 384; *Matter of Robinson,* 40 App. Div. 30, 57 N. Y. Supp. 523; *Downing v. Marshall,* 37 N. Y. 380; *Will of Budlong,* 100 N. Y. 203, 3 N. E. 334; *Matter of Holden,* 126 N. Y. 589, 27 N. E. 1063; *Matter of Robinson,* 160 N. Y. 448, 55 N. E. 4.

The foregoing somewhat lengthy treatment of the general subject, though largely historical, is helpful in that it indicates clearly the basis for such legislation as that in question, viz.: that it relates to dealing with the subject matter in the nature of an action *in rem*, all parties interested in the *res* being served by all others being brought in so as to be bound, who have, presently or contingently, or may claim to have any interest therein. That does away, manifestly, with all constitutional objections as regards reasonable compensation to the necessary judicial aids to that end, such as guardians *ad litem*. The treatment of the subject also shows that a very narrow limitation of reasonable compensation in a case of this sort, where it is chargeable to and collectible out of a fund *in custodia legis*, on principle, is not new. There are statutes in some other states on the subject, notably in New York, California, Kentucky, Iowa, and Texas, making some provision for compensation in such circumstances. But in such cases the power is, directly or indirectly, carefully fenced

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about so as to prevent abuse. Where the common law prevails abroad and in the states, with but few exceptions, the time-honored rule is left in full force, that the court may command the service of any member of its bar when it needs an instrument of the sort to stand for the helpless, and that the service, aside from the capacity of the infant to pay, must go unrequited except by the privilege enjoyed as a member of the profession and the distinction of having well performed the duty assumed *cum onere*. *Stephenson v. Norris,* 128 Wis. 242, 264, 107 N. W. 343; *Richardson v. Tyson,* 110 Wis. 572, 579, 86 N. W. 250; *House v. Whitis,* 5 Baxt. (64 Tenn.) 690; *Wright v. State,* 3 Heisk. (50 Tenn.) 256.

It may be safely said to the honor of the profession that the interests of judicial wards have been as faithfully conserved from time immemorial by the discharge of that duty, gratuitously in many cases, as probably it will be under a system securing therefor a more certain money value, but it is recognized that the legislature may relieve the profession of that burden with its correlative honors if it sees fit.

The statute provides that in a case of this sort the guardian *ad litem* "may be allowed compensation for his services and for his necessary expenditures in the litigation, *to be fixed by the court,* in which such proceedings or litigation is had, and be paid out of the body of the estate or property in controversy, if the infant has no available property out of which such payment can be directed by the court." The term "fixed by the court, in which such proceedings or litigation is had," is unambiguous. Doubtless whatever original authority in the matter existed as to this case was lodged in the court rendering the judgment complained of as regards *the litigation in that court.* No basis for compensation is suggested in the law. Not even the word "reasonable" is used, as in every similar statute, so far as we can discover. A very broad discretion, however, may be read out of the language as to whether an allowance shall be made or not and to what ex-

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tent, from the words "may allow," etc., while it might be argued that "may" should be construed as must. Facing the matter the legislature had to deal with in the light of the mischiefs thereof as we have detailed them, the former view would seem to be the correct one. We adopt it both as regards power to determine whether compensation shall be allowed or not and the amount thereof. That discretion the legislature necessarily contemplated would be a sound legal discretion; that it would be guided by the general judicial conception here of the measure of such services when compensation by common-law rule is permissible; and that the circumstances as to whether the compensation would come out of property belonging to the infant and whether he has any interest in the subject conserved and many other things would be given their legitimate common-sense bearing. It is quite manifest that a basis of compensation, as in ordinary cases between party and client, was not thought of. That would be contrary to the standard in that regard for guardians *ad litem* in general and particularly in this state. The rule was firmly established here long before the law was passed that the basis should be that ordinarily paid to compensate for official services of a somewhat similar character. *Richardson v. Tyson,* 110 Wis. 572, 579, 86 N. W. 250; *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 513, 86 N. W. 243; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909.

In the cases cited it was said that judicial officers perform their public duties "for pecuniary rewards wholly incommensurate to what the same industry, learning, and ability would have commanded at the hands of clients." It is upon such basis "rather than with private contract that compensation should be made in measuring the allowance to" a guardian *ad litem. Richardson v. Tyson, supra.* Later the growing and pernicious practice of extravagantly exploiting trust funds under judicial control for the enrichment of judicial assistance, such as attorneys for receivers and guardians *ad*

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litem, was enlarged upon and the rule above stated was reiterated and made as significant as could well be, to the end that courts might set an example of careful, businesslike conservation of trust property; and members of the profession, called to stand for absent and incompetent beneficiaries under the court's appointment or with its approval, might better appreciate that it contemplates performance of duties incident to the high privilege of a member of the court and in part compensated thereby and by its honors; this vigorous language being used by Mr. Justice DODGE:

"Only in the wise discretion and firmness of courts can there be found prevention or remedy for the abuse and disgrace of judicial conservation of estates from their enemies, only to permit their destruction by the very salvers. If such abuses continue, the beneficent power of a court of equity to take to its sheltering arms a litigated estate while rights to it are being established will become a mockery, worse than the avoided perils as it is more effective." 110 Wis. 513, 514, 86 N. W. 246.

It was in face of unwritten law elsewhere, as above, that no compensation to a guardian *ad litem* can be justly allowed in excess of something in the nature of taxable costs chargeable to the prevailing party or payable out of his property, and the unwritten law recognized here, that none whatever should be allowed payable out of the property in which the person represented has no interest, and the general policy of the written law in other jurisdictions, that in case of compensation in the instances where by the unwritten law it is not allowable the same should be quite limited so as to prevent abuse, and the further unwritten law that such compensation, where allowable, should be on the scale of official services, that the law in question was passed, giving the court, as before indicated, discretion to allow compensation or not and limiting the same, by necessary inference, in any event, to what is reasonable under the circumstances. Manifestly the word "reasonable," as here used, is referable to the judicial stand-

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ard, so recently and firmly established, and the circumstance which cuts some figure by the unwritten law, of whether the service is in conservation of property belonging to the party represented or not, is not to be wholly lost sight of.

Testing the propriety of the amount allowed the guardian *ad litem* by the foregoing, it appears at once so entirely out of harmony with the correct standard as not to be measurable at all thereby, showing clearly that it was not in the judicial mind of the court below, hence its decision is not entitled to any weight in now determining what is proper.

The case did not involve any very intricate questions of law nor any of fact as regards methods of proof. The rules to be followed in the litigation were substantially removed from all uncertainties by many decisions of this court. The trial occupied about eight days. There seem to have been many witnesses, easily obtainable, who were not at all adverse to testifying fully in respect to the matter in contestants' favor. Some over thirty witnesses were called who testified, in general, in harmony. Under all the circumstances it seems that ten to twenty days was ample for preparation of the case for trial; all services rendered outside of the trial in circuit court. The property involved consisted of somewhere about $40,000 money value, but the work was neither more nor less because of the magnitude of the estate, though, of course, the responsibility was, by reason of that feature, somewhat enhanced. The guardian *ad litem* was appointed, we must assume, because of his well-known fitness for the position, so he did not need an assistant distinguished attorney, accustomed to charge liberally because of his professional ability, for his services. The court allowed, in the whole, about eight per cent. of the entire fund, and, as appears, allowed a like amount on the other side to be charged to the estate.

With what has been said we may well refer to the following to emphasize our conclusion that the allowance to the guardian *ad litem* was very far too large. With the other

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allowance, incidentally referred to, we have nothing now to do. In *Smith v. Smith,* 69 Ill. 308, there was a property around $40,000 involved, belonging to the infant. The compensation to the guardian *ad litem* was supposed to be payable out of the infant's property. The litigation was important and considerable. It was attended to in the infant's behalf with commendable fidelity and was successful. Attorneys testified to the reasonable value of the guardian *ad litem's* service, ranging from $1,000 to $10,000. The trial court allowed $3,500. On appeal it was held that in the proceedings to fix the compensation of the guardian *ad litem* the latter was in an adversary capacity to the ward, who was therefore unrepresented, and that $1,000 for the service would be liberal, if not large, the court remarking, "Courts have no power to be prodigal with the means of their wards, and whilst they should make just allowances, they are bound to see that their funds are protected."

In *Loftis v. Butler,* 58 S. W. (Tenn. Ch. App.) 886, there was considerable litigation and a trial in two courts. The guardian *ad litem* was allowed $150—$25 payable out of the general property as costs, and $125 out of the infant's property. On appeal the allowance was not disturbed, but it was held that in such proceedings the guardian *ad litem* and the ward are adversaries, and the latter should be represented by one competent to protect his interests. We may well remark, in passing, that there is much support for that holding, without laying down that such representation is necessary and failure in that regard is jurisdictional error, as is held in some jurisdictions. At least, want of such representation throws the greater burden upon the court to see that its ward is properly protected.

In *Tyson v. Richardson,* 103 Wis. 397, 79 N. W. 439, there was a large amount of property involved, very much more than in this case. It belonged, in the main, to persons whose interests were represented by the guardian *ad litem.* The

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questions involved were interesting, complicated, and somewhat new. They required careful study by one possessed of sufficient ability to carefully investigate and analyze precedents and to discover, comprehend, apply, and present most important legal principles. The duty was performed with distinguished ability and success. The service extended through several years, during which there were several trials in the courts of original jurisdiction and several in this court; the guardian *ad litem* meeting in opposition, and successfully, some of the best legal talent in the state. For all such service, on the basis of official work, this court allowed $2,500.

In *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909, the services extended over a period of some five years. The claims adjudicated and property involved ran up into the hundreds of thousands of dollars. There was important litigation in many courts in different jurisdictions, some of which was outside of this state. It was attended with almost unprecedented perplexity and was represented by the judicial assistants with commendable fidelity by two distinguished members of the bar. The court allowed as compensation, on the basis of one such attorney, under the rule before indicated, $10,000.

In view of the foregoing we are of the opinion that the compensation of the guardian *ad litem* in this case, including that of his assistant up to and inclusive of the final closing of this litigation, should be limited to $500. The amount allowed by law for an attorney acting under the appointment of the court in the defense of an indigent person charged with a criminal offense is but $15 per day. That exceeds the compensation allowed the highest officer of the state in its legal department, the attorney general, and more than twice that allowed his first assistant.

We do not overlook the suggestion that the allowance of $3,000 to the guardian *ad litem* was by consent of the attorneys for the proponent, and supposed attorneys for the chief

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beneficiary under the will, and that the judgment was prepared by such attorneys and entered on their motion. There are indications in the record that the court merely adopted the joint request of the attorneys in the case, $3,000 being allowed to each side. That was very fair, from one viewpoint, but, as before indicated, the attorneys had no power whatever to stipulate away the trust fund, and their attitude in that regard should not have been recognized by the court.

The point is made by proponent's counsel that no allowance should have been made by the circuit court for what occurred here for expenses and services of the guardian *ad litem* and on account of the judgment for costs rendered against the infants in this court, because on application here to direct such allowance it was denied,—and in close connection therewith the question is suggested, but not urged, as to whether, under the law, a court has jurisdiction to make any allowance except on account of litigation therein.

For both of the reasons above mentioned it seems the circuit court should not have made any allowance except for what there occurred. The law is very explicit that the allowance in any instance is "to be fixed by the court in which the proceedings or litigation is had." Evidently it was the legislative intention to confine original action in such a matter to the jurisdiction most liable to be well armed, by personal observation, to administer the law without the abuses the judicial rule was designed to prevent. So the trial court acted without jurisdiction in making allowance for litigation occurring here; and this court observed the letter of the statute, and of the application here, in refusing to make a direction which would have required another court to pass on the allowance for services and disbursements in litigation not had there, and particularly in refusing to direct payment out of the estate, of the judgment for costs against the guardian *ad litem*.

It will be observed that the permissible allowance, outside

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of for services, is for "necessary expenditures" of the guardian *ad litem*. That does not include a judgment for costs against a ward. A guardian *ad litem* is not liable for such a debt, and so payment thereof by him is not a necessary expenditure within the meaning of the law, unless it is made by some law a condition precedent to a further step in behalf of the ward, or by reason of some other circumstance out of the ordinary, which is not the case here. It follows that the allowance for necessary expenditures in the court below should have been limited to $343.75, and the elements of costs and disbursements here, amounting to $110.70, should not have been allowed.

We agree with the court below that it was not the legislative purpose that the allowable expenditures should be taxed according to the practice for taxing statutory costs. Nevertheless, competent and definite proof in such a case should be required as to each item and all parties having adverse interests should have notice, and, in a case of this sort, the proponent should make the appropriate counter-proofs, which justice requires. No proof on either side seems to have been made, except the formal affidavit of the guardian *ad litem* to the schedule of disbursements. Explanation might well have been required of some of the charges. The trial court was not bound to allow the bill, even though verified, because not opposed by evidence. However, we cannot say there was a fatal abuse of judicial discretion in disposing of the matter as was done.

Lastly it is contended that the words of the statute,—"paid out of the body of the estate or property in controversy if the infant has no available property out of which such payment can be directed by the court,"—does not restrict the fund to which resort can be had, primarily, to property under control of the court, but includes any property of the ward out of which his indebtedness may be collectible. It may well be that such is the better policy, one more in harmony with the

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well-nigh universal rule, both under the written and unwritten law. However, the legislature seems plainly to have used the term "payment can be directed by the court" with reference to existing conditions produced by judicial effort to limit the previously supposed unjustifiable practice before alluded to, with the intent to supersede such efforts to the extent of restoring the old practice in some particulars. So viewing the law,—however much it may appear that, as an original matter, a fund in court in which a person is not interested should not be depleted to compensate for efforts in his behalf to obtain it, or some part of it, notwithstanding it cannot be distributed to the real owner without his presence, so long as he possesses property available for the payment of his debt,—we cannot change nor nullify it so long as it is constitutional, as we are of the opinion, as before indicated, it is.

The action in refusing to direct the court below on the motion before referred to, does not preclude now allowing the guardian *ad litem* such compensation as he should have for services and necessary expenditures in this court. It is a proper matter to consider in this disposition of the case, and we are disposed to make a proper award without further application, and thus speed a final termination of the litigation.

As before indicated, it is the opinion of the court that $500 is all that should be allowed for services from the time the litigation commenced in the circuit court till it shall have been terminated by the entry of the proper judgment under this court's mandate. The $500 must cover the pecuniary reward for services in both courts. The expenditures upon the former appeal, according to the presentment in the court below, were $24, exclusive of the judgment for costs, which is not to be counted. That and the disbursements on this appeal, as taxed by the clerk, under the ordinary rule for taxing costs, except that the taxation must include the personal expenses of counsel in coming here and attending upon the hearing of the appeal, should be allowed. Such amount should

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not be taxed as costs, but as expenditures under the law in question, taxed by direction of the court. The particular manner of arriving at the amount is adopted as just and a convenient one to speedily end the matter, and not, necessarily, as a binding precedent to govern future matters of the kind.

By the Court.—On the contestants' appeal the judgment is affirmed *ex necessitate.* On proponent's appeal the judgment is corrected so as to be for $500 for services in the circuit court and this court, and $143.75 for necessary expenditures for litigation in the circuit court over and above the $200 deducted from the total in the court below, and $24 for such expenditures on the first appeal in this court, and such further sum as may be taxed by the clerk under the court's direction, as indicated in the opinion, the whole to be paid out of the body of the estate; and, as so modified and perfected, the judgment on proponent's appeal is affirmed. Costs are to be taxed in favor of the proponent as the prevailing party on both appeals.

The following opinion was filed March 9, 1909:

MARSHALL, J. A motion for a reargument on the part of the contestants, duly submitted, has received attention, resulting in the following conclusions:

Counsel refer, at length, to the use of the words "The United Presbyterian Brethren," page 2 of the statement (*ante,* p. 182), when strict accuracy required, in place thereof, the words "Presbyterian Church" or the "Presbyterian Church of the United States of America." That does not bear upon the result to the amount of a feather's weight.

Counsel again refer to page 4 of the statement (*ante,* p. 184), where notice is taken of the fact that Elizabeth allowed interest to go uncollected for many years, this language being used: "There was the same habit during her sister's

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lifetime" when she attended to the business. Counsel say that is wrong, as the evidence shows that one year before Elizabeth's death all interest was collected and the same credited, and there is no evidence to show there was then a habit of allowing interest to run uncollected for from fourteen to seventeen years, as was done after Jane Ann died. Let us see. In the first place, the words of the statement, if wrong as claimed, would not affect the result in any event. In the second place, they do not suggest that Jane Ann was in the habit of allowing interest to go uncollected fourteen to seventeen years, but, merely, that it was the habit during her lifetime, as it was afterward, for interest to go uncollected for years. Now to the record on that. It shows, page 94 of the printed case, that in 1889 the interest was figured up on all Elizabeth's certificates and a statement was made thereof, amounting to $2,617.80; that Elizabeth handed in the certificates to have the interest figured up and that a new certificate for the amount of such interest was issued, which certificate and statement were found among her papers after she died. By reference to the statement, pages 111 and 112 of the printed case, we find that thirty-eight certificates were listed and that interest was back for many years on all of them, the longest time being from December 5, 1873, or nearly sixteen years, and the shortest from August 3, 1883, about five and one-half years, the average being somewhere around eleven years. That seems to bear out what is said in our statement.

Counsel further call attention to page 9 of the opinion (*ante,* p. 188), where it is said, "*Frame* was not an officer of the corporation when he testified," and argue that it is inconsistent with the following words, on page 5 of the statement (*ante,* p. 185), as to the organic law of the corporation: "Those in office to hold till their successors are elected and qualified," in view of the testimony of Carrier that at the time *Frame* testified no one had been elected and had quali-

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fied to fill his place. Counsel make such argument upon the theory that an officer in a corporation, where the organic law provides that his term of office shall continue till his successor is elected and qualified, remains an officer till such time notwithstanding his resignation. That is not the law. On the contrary, it is to the effect stated in the opinion, *i. e.* even in case the corporate charter provides that the officer shall hold till his successor is elected and qualified or appointed and qualified, he, nevertheless, by resignation, without any acceptance, unless acceptance is specially required by such charter, vacates the office for all general purposes. 7 Thomp. Comm. on Corp. § 8460; *Fearing v. Glenn,* 73 Fed. 116.

Counsel seem to think that *Browning v. State,* 33 Miss. 47, was misapplied. Quite plainly it is the counsel, not this court, that misunderstand the case. It differs only from the dissenting opinion in the case and with others we cited, notably *Shollenberger v. Brinton,* 52 Pa. St. 10, as to what should be considered a ground of error upon which there must be a concurrence of a majority of the judges in order to work a reversal. FISHER, Justice, who wrote the opinion upon the motion for a rehearing, which evidently the counsel did not read carefully, said:

"I hold that a majority of the court must, in every case brought into this court, agree upon error, before reversing a judgment of the court below. But when I make this declaration I at the same time say that the error must be something which could, under proper rules of practice, be assigned as error."

Thus the court sustained the general rule, but held that it was applicable only to error in the broad sense that might include many detail errors, as, for instance, that all grounds for a new trial required to be raised by a motion for a new trial and exception saved to the order denying it, constitute but one ground of error within the rule. In that case, that an order denying a motion for a new trial because the verdict is

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contrary to the evidence, and because of misconduct of the jury, if erroneous, is single, supported, perhaps, by two reasons, and that a concurrence upon the reasons is not necessary. To that Judge HANDY dissented, holding failure of concurrence upon a single ground of error, in a much more restricted sense, requires affirmance of the judgment. He stated the position thus:

"It thus appears that although two members of the court are of the opinion that the judgment should be reversed, yet they do not agree that there is any error in any specific decision or ruling of the court below; and when the grounds of error assigned were considered by the court below *seriatim*, a majority of the court were, and still are, of the opinion that there is no error in any specific decision or ruling of the court."

He thus stated his conclusion, basing the same on unanswerable logic:

"Although a majority of the court may not agree in the reason which led each of their minds to the conclusion, that any specific rule or point of law has been erroneously decided, yet it is necessary that a majority should concur in the opinion that there is error in one and the same rule or point of law, as held by the court below. Otherwise, if the case goes back for a new trial, and the same point arises, the decision of the court below would, necessarily, be the same as was previously made, because the judge would be bound to know that this court had held that there was no error in that particular decision. . . ."

The learned judge further stated that the natural result of any other rule would render it impossible to finally determine a jury case if the trial judge adhered to his opinion and the judges of the appellate court adhered to their individual views, and further as to the particular case:

"The generality of the assignment does not amalgamate points and questions of law which are in their nature distinct, and which this court must pronounce upon as legal questions in deciding the case. Suppose, on the trial, the court below

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had granted the instructions at the instance of the state. The assignment of error here on that ground, under the strict rule which formerly prevailed here upon the subject, would be a general one, that the court erred in granting the instructions for the state. And, in considering that assignment, the first instruction comes up, and two members of the court think that there is no error in it, the third member considering it erroneous. It is then settled that there is no error as to that. The second instruction is then considered, and two members are of opinion that there is no error as to that, one of the majority upon the first instruction thinking that there is error in it. It is then settled that there is no error as to the second instruction. The third is then considered, and determined by a majority of the court to be proper, the member who agreed with the majority upon the two other instructions dissenting upon this. It would be settled that there was no error in the third instruction. It would, therefore, clearly be the judgment of the court that there was no error in any of the instructions. And how is it possible that the general mode of assigning errors could make error in that which was not error in itself, or that several propositions, which in themselves were distinct and separate, and ascertained to be correct and proper, could be rendered erroneous by being considered together?"

Counsel suggest that *Bell v. Morrison,* 27 Miss. 68, which we cited in the former opinion, does not apply. The difficulty with counsel is that they do not understand that case, and perhaps it is not to be wondered at since the report is not full. We think it is safe to take what Justice HANDY said in *Browning v. State,* 33 Miss. 47, of the result in *Bell v. Morrison,* as he wrote the opinion in the latter case. It is evident that the conclusions reached in such case on the motion for rehearing, which the report shows was made, were not written out, and the only evidence we have of them is what Justice HANDY said in the latter case. He there said:

"I consider this motion as settled by the rule held by this court in the case of *Bell v. Morrison,* 27 Miss. 68, where the court was divided in opinion upon two points in the case, but

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there not being a majority holding that upon either of the points there was error. The first impression of the court in that case was that the judgment should be reversed, there being a majority of that opinion, as in this case; but upon motion after argument, the decision was that the judgment should be affirmed, which was accordingly done, because there was not a majority of the court holding there was error in any of the points decided by the court below."

Counsel concede that *Cook v. Drew,* 3 Stew. & P. 392, and must also agree that *Bell v. Morrison, supra,* is against them from any point of view, and that the same is true of *Browning v. State, supra,* unless the assignment of error that the finding as to legal capacity to make the will and the one as to undue influence, so far as error is concerned, are single.

Counsel argue that there was but one error, not two, notwithstanding the fact that there were two findings and two specific claims of error, grounded on separate exceptions, made and argued. The following quotation from *Cook v. Drew, supra,* shows that the situation presented was exactly the same as in this case. The court said:

"One member of the court is for reversal on one of the points; another on a different point; and the third thinks there is no error in the record. Hence it results that though a majority believe there is error, this majority cannot concur as to the *point,* or *matter,* for reversal, so as to determine any principle of decision. . . . To authorize a reversal, this concurrence is required in the result, on some material point necessarily involved in the case."

Counsel fail to distinguish between a point vital to a judgment and mere reasons bearing thereon.

Counsel also concede that *Shollenberger v. Brinton,* 52 Pa. St. 10, was governed by the same rule as that which prevailed in *Cook v. Drew, supra,* but avoid the result by suggesting that all of the exceptions to the findings constituted but one ground of error. If that were correct, in a case involving any number of findings of fact, each vital to the case, and

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each specially excepted to as wrong, and one out of seven justices was of the opinion that some specific finding was contrary to the evidence, being opposed by his six brethren, and the same condition existed as to three other findings, a different justice, however, as to each such finding being for a reversal, the judgment would have to be reversed. It would be hardly possible to think of anything more absurd.

Counsel refer to *Pollock v. C. Hennicke Co.* 64 Ark. 180, 46 S. W. 185. True, that is an adverse decision. Its glaring infirmity is plainly pictured by BLACKWOOD, special judge, in an able dissenting opinion. He said, in substance: There is no concurrence of a majority of the judges on any point. There are a majority of minorities in favor of error. The result of a decision that there is fatal error is this: In case of another cause, similar in every respect, being submitted below and the court following the majority opinion now made, it would arrive at a result entirely different from the decision now given. It would necessarily be contrary to the majority view of a majority of the judges on the identical point in this case. He said in concluding, very properly, "It strikes me as an effort to make one right out of two wrongs. The result announced by a majority of the learned judges is arrived at by a species of logic which I am unable to comprehend, and therefore unwilling to sanction."

The Arkansas court seems to have been misled by *Ashby v. White,* 2 Ld. Raym. 938, 950, which, when examined, is found not to involve any question, whatever, as to the disposition of a case on appeal from a trial court where a majority are unable to agree as to the existence of a specific harmful error. Investigation shows probability that the English case was not examined by the Arkansas court, but was taken from the citation in Ram's Legal Judgments, 53, which is also cited by the Arkansas court. It will be seen, by examination, that the text-writer was not dealing with the subject under discussion in this case at all, but the subject of the disposition of a

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cause tried originally, not on appeal, before a bench of judges. In that case minorities, in reason, unite, if the individuals by different processes of reasoning reach the same result. Failure to appreciate the difference between that situation and the reversal of a case on appeal on errors assigned, is doubtless what led to the decree in *Smith v. U. S.* 5 Pet. 292, 303. So the basis for the decision by the Arkansas court entirely drops out.

Counsel make a further reference to *Ditch v. Sennott,* 116 Ill. 288, 5 N. E. 395, as being squarely in favor of contestants' position. Why that case was cited we are unable to comprehend, because it does not deal with the subject under discussion or have the remotest reference to it. There was no assignment of error whatever in that case and the appeal was dismissed upon that ground, all the justices concurring.

Counsel seem to think that our suggestion that the views of Judge HANDY in *Browning v. State,* 33 Miss. 47, were later referred to in the same court with high commendation, was not warranted, and that the reference, such as was made in the later case, was a doubtful commendation. Perhaps the best solution of that may be made by quoting the language of Judge WHITFIELD, who wrote for the court on the motion for rehearing (*Lipscomb v. State,* 75 Miss. 559, 623, 23 South. 210, 230):

"Judge HANDY's opinion in that case is said to be a very powerful one, and it certainly is, and, in the judgment of the writer, is the sound view."

That was as far as it was permissible to go, as the point was not then vital. One cannot well read Judge WHITFIELD'S opinion without concluding that, had such point been vital, the court would have returned to the doctrine which Judge HANDY said ruled *Bell v. Morrison,* and which his brethren disclaimed intending to depart from, but did, as Judge HANDY reasoned, by grouping vital points of error as mere reasons in support of a single assignment.

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There is a class of cases such as *Foltz v. Merrill,* 11 Kan. 479; *Wood v. Chapin,* 13 N. Y. 509; and *Oakley v. Aspinwall,* 1 Duer, 1, holding that where a majority are for affirmance, but on different grounds, the judgment should not be reversed. They are not out of harmony with *Cook v. Drew, supra,* and similar cases. Of course a judgment is always to be affirmed unless there is a majority for reversal, and, as we think, agreeing upon a specific ground of error, which could not be possible if a majority were for affirmance, even on different grounds. The former leads, logically, to the latter.

We are unable to see any other orderly way to dispose of an appeal in the circumstances of this one, except according to the rule in *Cook v. Drew,* 3 Stew. & P. 392, and like cases. If the rule contended for were to prevail, a jury case could never be terminated, if both sides persisted and courts adhered to their views, and the judgment in an equity case would create this anomalous situation: The judgment on its face would be a precedent to sustain either of the several positions taken by the several minorities, though looking at the determination as to each of the subsidiary questions, the precedent would be the other way. Such confusion should be avoided by adopting the more logical rule, as we have done.

By the Court.—The motion for a rehearing is denied, with $25 costs.

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KILEY, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

November 11, 1908—March 9, 1909.

Constitutional law: Equal protection of the laws: Due process of law: Corporations: "Persons:" Classification for legislative purposes: Railroad companies: Liability for injuries to employees: Questions for jury: Depriving courts of judicial power: Statutes: Partial invalidity: Police power: Contributory negligence: Comparative negligence: Liberty of contract: Injuries in other states.

1. Corporations are entitled to the same protection as individuals under the constitutional guaranties of liberty and equality, and are "persons," within the meaning of the XIVth amendment, Const. of U. S., providing that no state shall deprive any person of property without due process of law or deny to any person the equal protection of the laws.
2. The rule of equality before the law does not preclude classification for legislative purposes, if the classification is not arbitrary but is based upon substantial distinctions, is germane to the purpose of the law, is not based on existing circumstances only so that there can be no change in the membership of a class, and provided the law applies equally to all members of each class.
3. The necessity and propriety of such classification are to be determined by the legislature, and if made in conformity with the rules above mentioned it cannot be disturbed by the courts.
4. The business of operating a railroad differs from others in its nature, in its relation to the public, and in its peculiar dangers to employees and to the public, so as to justify special regulation, and to that end the separation of railroad companies into a class for purposes of legislation having for its object the protection of their employees and the safety of the public.
5. Ch. 254, Laws of 1907,—amending sec. 1816, Stats. (1898), and imposing upon every railroad company liability for all injuries sustained by any employee thereof (except employees working in shops and offices) while engaged in the line of his duty as such, caused in whole or in greater part by negligence of any other employee of such company,—is designed to enforce greater care on the part of the companies in the selection of employees and thereby to secure not only protection for the employees but the safety of the public, and is not invalid under the constitutional guaranties as to due process of law and equal protection of the laws.

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6. It is not essential to the validity of such legislation that its operation should be confined to employees actually engaged in operating trains or incurring risks peculiar to the railroad business,—the special regulation having reference to railroad companies as a class, and not necessarily to any particular class of employees.
7. Office and shop employees of railroad companies are sufficiently distinct in their employment and relation to the conduct of the business to justify the legislature, within the field of its discretion and with regard to public policy, in exempting them from the operation of the law.
8. Subd. 5 of said sec. 1816, Stats., as amended by ch. 254, Laws of 1907 (providing that "in all cases under this act the question of negligence and contributory negligence shall be for the jury"), is merely declaratory of the law as it existed, namely, that when the court has found that there is legal evidence tending to show negligence or contributory negligence it is for the jury to determine from the evidence adduced whether negligence or contributory negligence in fact existed. It does not, therefore, deprive the courts of any judicial power vested in them by the constitution (art. VII, sec. 2).
9. Even if said subd. 5 were construed as conferring judicial power upon juries its invalidity would not render the other portions of the act invalid, it being a separate and distinct provision, not the compensation for or inducement to the enactment of such other portions.
10. Subd. 3, 4, of said sec. 1816 (providing, in effect, that contributory negligence of the injured employee shall be no bar to a recovery if the negligence of the company or other employee contributed in a greater degree to the injury) are within the legislative power of police regulation, and cannot be held so arbitrary and unreasonable as to be invalid under the constitutional guaranties of equal protection and due process of law.
11. Subd. 6 of said sec. 1816 (providing that no contract, rule, or regulation shall exempt a railroad company from the full liability imposed by the act) is a proper provision, within the discretion of the legislature, to secure to employees the benefits of the rights created, and does not unduly infringe the company's right to liberty of contract.
12. Subd. 8 of said sec. 1816 (which seeks to extend the rights and liabilities created by the act to cases where the injuries were received in another state if the contract of employment was made in this state) deals with a subject independent of and severable from the other parts of the act, and if invalid does not render the whole law invalid. [Whether said subd. 8 is invalid or not is not determined.]

MARSHALL, J., dissents.

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APPEAL from an order of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Plaintiff brings this action for the recovery of the damages alleged to have been suffered by reason of the loss of an eye and the physician's and nursing bills incurred as the result of an injury which he claims was due to the negligent and careless manner in which other employees of the defendant performed their duties. On July 2, 1907, plaintiff was engaged with other employees of the defendant in the construction of a wire fence along the defendant's right of way. The company's foreman had directed them to take certain wire off an old fence. The wire was held in place by staples and these were to be pulled out. Plaintiff was advancing toward a fence post with a hammer, intending to pull out the staples, when two of the other employees, by pulling upon the wire, pulled a staple out of the post. The staple flew into the air, struck plaintiff in his right eye, and blinded him. The action is brought under ch. 254, Laws of 1907. The court overruled defendant's demurrer to the complaint. This is an appeal from the order of the court overruling the demurrer and allowing the defendant to answer within twenty days upon the usual terms.

H. O. Fairchild, attorney, and *Burton Hanson,* of counsel, for the appellant.

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

The following opinion was filed January 5, 1909:

SIEBECKER, J. Plaintiff's right to recover on the alleged cause of action is founded on the provisions of sec. 1816, Stats. (1898), as amended by ch. 254, Laws of 1907. There is no claim that the facts alleged in his complaint constitute a cause of action against the defendant at common law or under sec. 1816, Stats. (1898), as it stood prior to its amendment by ch. 254, Laws of 1907. The lower court sustained the complaint upon the ground that sec. 1816, Stats. (1898),

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in its amended form is valid. The defendant avers that the amended statute creates liabilities and imposes burdens which are forbidden by secs. 1, 9, 13, 22, art. I, of the state constitution and by the XIVth amendment to the federal constitution. The alleged obnoxious provisions of the statute were added by the amendatory act, which is embraced in ch. 254, Laws of 1907. It is therefore contended, if this act is invalid, that the provisions of sec. 1816, Stats. (1898), as it stood prior to such amendment, are still in force as the law on the subject. The provisions of ch. 254, Laws of 1907, are assailed as invalid legislation upon several grounds.

It is first contended that the enacting part of this chapter and subd. 1, 2, and 9 must read together, and that when so considered the act is unconstitutional because it denies to railroad companies equal protection and due process of law. These provisions are:

"Every railroad company shall be liable for damages for all injuries, whether resulting in death or not, sustained by any of its employees, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employee:

"(1) When such injury is caused by a defect in any locomotive, engine, car, rail, track, roadbed, machinery or appliance used by its employees in and about the business of their employment.

"(2) When such injury shall have been sustained by any officer, agent, servant or employee of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant or employee of such company in the discharge of, or by reason of failure to discharge, his duty as such."

"(9) The provisions of this act shall not apply to employees working in shops and offices." . . .

There is no controversy raised as to the rights of persons under the provisions of the state and federal constitutions guaranteeing to all persons the equal protection and due

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process of law. It is, however, contended that the legislature had no power to impose on railroad corporations only the burdens and liabilities embraced in this statute, and thus to exempt all other corporations, persons, and associations from these burdens and liabilities. Appellant's chief contention is that this legislation is discriminatory against railroad companies and violates both the state and federal constitutions forbidding arbitrary and special legislation and the constitutional guaranties of due process and equal protection of the laws. It is said that corporations are entitled to the rights of a person within these constitutional guaranties of liberty and equality and that they are afforded the same protection as individuals against an invasion of these rights. They must be granted equal means and equal access to the courts for the protection of their rights, and the imposition of burdens, liabilities, and charges which are not imposed on all others under the same circumstances is forbidden. These rights of corporations were recently recognized in the case of *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456. As declared in the opinion of the court in *Covington & L. T. R. Co. v. Sandford,* 164 U. S. 578, 592, 17 Sup. Ct. 203:

"It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws" (citing cases).

Since, then, the railroad company, which is the defendant, under these constitutional provisions is protected as an individual in its rights, the question recurs, Do the provisions of ch. 254, Laws of 1907, violate these rights? As this court stated in the *Phipps Case:*

"When by statute a person, natural or artificial, is denied an equal remedy in the law or equal protection in the courts, such statute is void [citing]. To this broad rule of equality of all persons before the law is the exception of the right un-

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der certain circumstances of proper classification, but this classification must be reasonable and based upon certain rules which bear a just relation to the act in respect to which the classification is made [citing]."

That such classification must be based upon substantial distinctions, be germane to the purpose, cannot rest on existing circumstances only, nor preclude additions to those included in the class, and must apply equally to all within, received full elaboration in that case and the cases there collated and need not be repeated here. The power of classification for legislative purposes has existed at all times as an incident of legislative power, and exists now unless expressly forbidden by the constitution. It is also well recognized that the necessity and propriety of such classification are to be determined by the legislative branch of the government and cannot be disturbed when exercised within the limitations imposed. We must then determine whether the legislature by this legislation has violated accepted rules of classification.

The statute imposes liabilities on railroad companies for all injuries sustained by any of its officers, agents, servants, or employees while in the performance of their duties, which may be caused, in whole or in greater part, by the negligence of other officers, agents, servants, or employees, those working in shops and offices being excepted. It is strenuously urged that the imposition of these burdens and liabilities on railroad companies only, as a class, violates their right to the equal protection of the law, and that, being a classification based upon the character of the corporation, it furnishes no reasonable distinction or necessity for separating them into a class for purposes of legislation. To ascertain wherein distinction is made by the legislature between railroad companies and individuals and other corporations and associations we must consider the nature and object of the regulation as well as the provisions prescribing rules for the regulation of railroad companies as a class. The context of this statute shows that railroad companies are separated into a class for legislative regulation respecting their liability to

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their employees for injuries caused by their negligence or the negligence of other employees in the course of their employment. Is the railroad business distinguished in character from all other businesses so as to justify special regulation of it, as is done by this law? This we think must be answered in the affirmative. The business of operating a railroad differs from others in its nature, in its relation to the public, and in the peculiar dangers and hazards as regards its employees and the public. These characteristics clearly distinguish the railroad from any other business and call for regulation to meet the conditions and exigencies peculiar to it and such as are wholly inapplicable to any other business. The object of this law is to attain reasonable protection to its employees and to secure the safety of the public. The legislature seeks to attain this through the imposition of these unusual burdens and liabilities, thereby securing from railroad companies the exercise of a degree of care in the selection of competent and careful employees for the conduct of the business commensurate with the hazards and dangers to its employees and the insecurity of the public. Securing the safety of the public, in addition to the protection of its employees, is an important feature which distinguishes a railroad business from any other, and is an important consideration in separating railroads into a class by themselves for legislative purposes. The following cases, selected from many others, are authorities holding statutes similar to that contained in ch. 254, Laws of 1907, valid within the provisions of the state and federal constitutions guaranteeing equal protection and due process of law:

In the case of *Mo. Pac. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, the court considered a Kansas statute which enacted that:

"Every railroad company . . . shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage."

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In considering the claim that it was unconstitutional legislation the court says:

"It [the claim] seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. . . . And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same conditions. . . . It is conceded that corporations are persons within the meaning of the amendment [citing]. But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories."

In *Tullis v. L. E. & W. R. Co.* 175 U. S. 348, 20 Sup. Ct. 136, the court had under consideration the validity of an act of the Indiana legislature providing that railroad companies should be liable for injuries to their employees resulting from the negligence of fellow-servants. The provisions of the act extended to the same class of railroad employees as the act now before us and was attacked in the federal court upon similar grounds, but the court held that it was proper to treat railroads as a class by themselves for the purposes of such regulation, and that it was a valid enactment, reaffirming the doctrine of the *Mackey* and other cases upholding

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similar statutes of the states of Iowa and Ohio. See *Minneapolis & St. L. R. Co. v. Herrick,* 127 U. S. 210, 8 Sup. Ct. 1176; *Chicago, K. & W. R. Co. v. Pontius,* 157 U. S. 209, 15 Sup. Ct. 585; *Peirce v. Van Dusen,* 78 Fed. 693, 47 U. S. App. 339.

Recurring to this class of legislation in our state, we find the first enactment was embodied in ch. 173, Laws of 1875, under which railroad companies were made liable "for all damages sustained within this state by any employee, servant or agent of such company while in the line of his duty as such, and which shall have been caused by the carelessness or negligence of any other agent, employee or servant," and that no contract, receipt, rule, or regulation should exempt the company from such liability. In the case of *Ditberner v. C., M. & St. P. R. Co.* 47 Wis. 138, 2 N. W. 69, this court held that this statute was not obnoxious to the constitutional provision prohibiting unequal and partial legislation on general subjects. The court expressly rejects the views expressed in the opinion of the Iowa court (*Deppe v. C., R. I. & P. R. Co.* 36 Iowa, 52) respecting the proper basis of classification, and sustains the law, though it found that it was not restricted in its operation to such injuries as were sustained from the negligent operation of railway trains. The court there rejected the holding of the Iowa court which so restricted the application of the statute. In the light of this declaration we do not deem it necessary to further consider the Iowa case as an authoritative construction of our early statute.

It is contended that the true basis of classification is the one declared by the court in *Lavallee v. St. P., M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974, which in effect declares that the reason for treating railroad companies as a separate class for regulations of the nature of those embraced in the law under consideration is based on the peculiar hazards to employees incident to "the use and operation of railroads,"

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and that it is restricted to those whose injuries are the "result of such dangers." *Johnson v. St. P. & D. R. Co.* 43 Minn. 222, 45 N. W. 156. As we have shown, the ground for classifying railroads separately for the purposes of such legislation is not only to protect the employees against the peculiar dangers and hazards incident to the operation of the railroad, but also the security of the public.

The exemption of shop and office employees from the operation of the law seems an appropriate one, because they are not engaged in that part of the business which exposes them to the unusual dangers and hazards of the business; nor does their conduct bear so directly in securing the safety of the public. It is suggested that this exemption is improper because these employees may be subjected to hazards or perils equally dangerous to those to which other employees are subjected. Conceding that this may be true, still that would not invalidate the classification. We do not find the legislative power to classify confined within such narrow limits. As declared by this court in *State v. Evans,* 130 Wis. 381, 110 N. W. 241:

"Each new exercise of the power of police regulation presents anew to the courts the question of possible relationship between the distinguishing characteristics of the classes and the object and purposes of the regulation. As to the cogency or propriety of either the regulations made or of the importance of the distinctions . . . the courts have little concern. Those subjects rest with the legislature, and only when the court . . . is compelled to say that no one, in the exercise of human reason and discretion, could honestly reach a conclusion that distinctions exist having any relation to the purpose and policy of the legislation can it deny it validity [citing]."

Nor are distinctions between individuals of one class and of another the criteria merely of a classification.

"The question to be considered, however, is the distinction between the classes as classes, whether there are character-

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istics which, in a greater degree, persist through the one class than in the other, which justify legal discrimination between them [citing]."

We are of opinion that the office and shop employees are sufficiently distinct in their employment and relation to the conduct of the railroad business to justify the legislature, within the field of its discretion and with regard to public policy, in exempting them from the operation of the law. *Chicago, K. & W. R. Co. v. Pontius,* 157 U. S. 209, 15 Sup. Ct. 585; *Minneapolis & St. L. R. Co. v. Herrick,* 127 U. S. 210, 8 Sup. Ct. 1176; *Callahan v. St. Louis M. B. T. R. Co.* 170 Mo. 473, 71 S. W. 208; *Pittsburgh, C., C. & St. L. R. Co. v. Montgomery,* 152 Ind. 1, 49 N. E. 582; *Georgia R. & B. R. Co. v. Miller,* 90 Ga. 571, 16 S. E. 939; *Atchison, T. & S. F. R. Co. v. Matthews,* 174 U. S. 96, 19 Sup. Ct. 609; *Employers' Liability Cases,* 207 U. S. 463, 28 Sup. Ct. 141.

It is contended that the legislature intended to deprive the courts of their judicial functions, as conferred on them by sec. 2, art. VII, of the state constitution, by the provisions of subd. 5 of sec. 1816, as amended, and to confer such functions on juries, as they are constituted by the state constitution. The powers conferred on courts and juries by these constitutional provisions were well defined in the established system of jurisprudence in this country at the time of their adoption. This court interpreted these constitutional provisions as conferring on court and jury those well-defined powers as they existed and had been repeatedly exercised by court and jury under the common law. In *Callanan v. Judd,* 23 Wis. 343, in speaking of the significance of the phrase "judicial power as to matters of law and equity," employed in the constitution, as applied to the courts, the court declares:

"In actions at law they had the power of determining questions of law, and were required to submit questions of fact to a jury. When the constitution, therefore, vested in cer-

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tain courts judicial power in matters at law, this would be construed as vesting such power as the courts, under the English and American system of jurisprudence, had always exercised in that class of actions. It would not import that they were to decide questions of fact, because such was not the judicial power in such actions. And the constitution does not attempt to define judicial power in these matters, but speaks of it as a thing existing and understood."

See, also, *Oatman v. Bond,* 15 Wis. 20; *Klein v. Valerius,* 87 Wis. 54, 57 N. W. 1112; *Janesville v. Carpenter,* 77 Wis. 288, 46 N. W. 128.

Under the system of law as it then existed it devolved on the court to determine the legal sufficiency of the evidence tending to prove a fact; and when the court had judicially ascertained that the evidence adduced tended to establish the constituent facts of the matter at issue, it then devolved on the jury to determine whether, upon the evidence, the fact was satisfactorily proven. The powers of the court and jury in the administration of the law in these respects were distinct and well defined at the time of the adoption of our constitution and became vested in the court and jury by its provisions. They cannot be abrogated or modified by legislative action to the extent of impairing, in any degree, the judicial power. Under the constitution courts have become vested with the judicial power to determine the questions of the legal sufficiency of the evidence to establish the rights of the parties at issue and to apply the law to the facts when found, and this power cannot be withdrawn from them and conferred on juries.

Did the legislature intend by the provisions of subd. 5 of sec. 1816, as amended, to confer judicial power, vested in the court, on the jury? It declares: "In all cases under this act the question of negligence and contributory negligence shall be for the jury." In their general sense the words are but a declaration of the law as it exists, namely, that when

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the court has found that there is legal evidence tending to show negligence or contributory negligence, it is for the jury to determine from the evidence adduced whether negligence or contributory negligence exists. This interpretation of the provision does not make a change in the law and cannot affect the rights of any person. It is, however, asserted that if the phraseology of this provision be considered in connection with other parts of the law which pertain to the duties of the jury in these cases and the general purpose and object of the act, it is apparent that the legislature intended to confer on juries the judicial power to determine the legal sufficiency of the evidence offered as tending to establish negligence or contributory negligence in the case. It is claimed that this idea is supported by the language of subd. 3, declaring:

"In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any officer, agent, servant or employee other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant or employee other than the person so injured; and such other questions as may be necessary."

We do not find this claim to be well supported, and incline to the view that subd. 5 is merely declaratory of the law as it existed. If, however, it be assumed that the legislature intended to confer judicial power on juries, such as we have shown is inhibited by the constitution and such as would render this subdivision void, still this view of the subdivision does not necessarily render the whole act void, for we are persuaded that such invalid part cannot affect the validity of

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the other parts of the law. It is a separate and distinct provision, and if removed from the law leaves the other sections a complete and perfect regulation of the subject. It is manifest that the other provisions regulating the rights and remedies of the parties express the fundamental and dominant purpose of the legislature, and that this part, if void, was not the compensation for or the inducement to the enactment of the valid portions. The provisions of subd. 5 cover an independent subject, and can be completely severed and removed from the other provisions without causing any change in them or in their operative effect. Under such circumstances the invalid part of a statute should be dropped out and the valid portions retained and held effective. We, however, conclude that subd. 5 is merely declaratory of the law. No judicial power is therefore conferred on juries, and hence it cannot affect the validity of the other provisions of the law. *State ex rel. Cornish v. Tuttle,* 53 Wis. 45, 9 N. W. 791; *State ex rel. Chandler v. Main,* 16 Wis. 398; *Quiggle v. Herman,* 131 Wis. 379, 111 N. W. 479; *Ill. Cent. R. Co. v. McKendree,* 203 U. S. 514, 27 Sup. Ct. 153.

The point is made that the provisions of subd. 3 and 4 are arbitrary and discriminatory in their effect, confer special favors on employees, and impose unjust burdens upon and discriminate against the rights of railroad companies, and they therefore are repugnant to the principle of equal protection and due process of law. The rights and liabilities created by a law fixing liabilities for injuries to servants through the negligence of the railroad company or of coemployees and regulating the amount of recovery are within the legislative power of police regulation, and in the foregoing and other cases have been approved in many respects as appropriate and reasonable. The necessity and reasonableness and the propriety of the regulations prescribed all rest in the legislative judgment to such an extent that we cannot say that such authority has been arbitrarily and unreasonably

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exercised in the act before us. In *Quackenbush v. Wis. & M. R. Co.* 62 Wis. 411, 29 N. W. 519, in passing upon the validity of a statute which excluded the defense of contributory negligence to an action for damages occasioned through the want of fencing the railway right of way, this court said:

"It is doubtless true that the provision imposes an absolute liability in such a case. It certainly excludes the defense of contributory negligence where the corporation fails to perform the duty which the statute prescribes in the first instance. This is in the nature of a penalty for the neglect of the corporation to conform to a regulation which the legislature seems to consider essential for the protection of life and property. We think there can be no doubt but such laws fall within the police power. Whether the rule of absolute liability in such a case is founded in wisdom and sound public policy is not for the courts to decide."

See, also, *Quackenbush v. Wis. & M. R. Co.* 71 Wis. 472, 37 N. W. 837; *Employers' Liability Cases,* 207 U. S. 463, 28 Sup. Ct. 141.

The provisions of subd. 6 are assailed as invalid upon the ground that it attempts to deprive railroads of the right of liberty to contract with their servants for exemption from the liability imposed by the act. This subdivision enacts that:

"No contract or receipt between any employee and a railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule or regulation in regard to any notice to be given by such employee shall exempt such corporation from the full liability imposed by this act."

The railroad employers' liability act of 1875 (ch. 173, Laws of 1875), considered in *Ditberner v. C., M. & St. P. R. Co.* 47 Wis. 138, 2 N. W. 69, provided that no contract, rule, or regulation between an employee and the company for exempting the company from the liability imposed should be effective as between the parties. These provisions have obtained substantially as part of the law during the periods the various statutes on the subject have been in force. The pur-

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pose of these provisions obviously is to prohibit the company from effecting an abrogation of the liabilities created by the statute and to preserve these rights for the benefit of the employees. The legislature having created a right, it may, within its discretion, make provision against the deprivation and the impairment of the benefits arising under it, if in so doing the interested parties are not deprived of some constitutional right or privilege. The claim that the statute is an interference with the companies' constitutional right of liberty of contract does not give effect to important limitations on that right which are fully established in the adjudications. In *Frisbie v. U. S.* 157 U. S. 160, 15 Sup. Ct. 586, the court states:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and indeed may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property." See, also, *Patterson v. Bark Eudora,* 190 U. S. 169, 23 Sup. Ct. 821.

This clearly recognizes the power of the legislature to restrict the right of abrogating by contract the duty or to impair the benefit created by it. To deny the legislature this power would result in a denial to it of power to prohibit persons from contracting against what it declares to be public policy. In the following cases the power of the legislature to restrict the liberty of contracting respecting rights

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created by it, which in their nature and origin were akin to the rights created by the statute before us, was upheld: *Holden v. Hardy,* 169 U. S. 366, 18 Sup. Ct. 383; *Frisbie v. U. S., supra; Smiley v. Kansas,* 196 U. S. 447, 25 Sup. Ct. 289; *State v. Brown & S. Mfg. Co.* 18 R. I. 16, 25 Atl. 246; *Knoxville I. Co. v. Harbison,* 183 U. S. 13, 22 Sup. Ct. 1; *Kilpatrick v. G. T. R. Co.* 74 Vt. 288, 52 Atl. 531; *McGuire v. C., B. & Q. R. Co.* 131 Iowa, 340, 108 N. W. 902.

It is manifest from these adjudications that the object of the law in creating these liabilities is a subject of police regulation, not only for the benefit of employees, but also for the protection of life, person, and property, and therefore it has its reason and foundation in public necessity and policy. The provisions of subd. 6 under this doctrine do not unduly infringe appellant's right of liberty of contract. The inhibition is a proper regulation to secure the benefits of the rights created, and serves to promote the security of the public by causing a more careful selection of competent servants and an improved enforcement of their duties.

We do not find that the provisions of subd. 8 of the act are involved in the determination of this case, aside from its bearing on the validity of the other parts of the act. This subdivision seeks to extend the rights and liabilities created by the act to injuries in other states under contracts made in this state with employees. We are persuaded that the subdivision deals with a subject wholly independent of the other parts of the act and severable from them. We discover no grounds for saying that this section was designed as compensation for or inducement to the enactment of the other parts, and that the legislature would not have enacted the other parts without it. Under these circumstances it does not affect the valid parts of the law. Hence we need not pass on the question of its validity in this case and therefore we leave it undecided.

The allegations show that the plaintiff was an employee of

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the defendant and that he was not working in a shop or office at the time he sustained the injury. It is alleged that his injuries were sustained while engaged in the line of his duty and that they were caused by the negligence of other employees of the defendant while in the discharge of their duties. The facts alleged are sufficient to state a cause of action under the statutes.

By the Court.—The order appealed from is affirmed.

The following opinion was filed February 5, 1909:

MARSHALL, J. (*dissenting*). The most important judicial authority lodged in this court is that of passing upon the validity of legislative enactments. That great power is given to the court by the constitution, as definitely, if not as expressly, as power is given to the legislature to enact laws. In its special field the court is absolutely independent. It is answerable only to the people as their will is seen in the fundamental law. The power is not discretionary, now to be exercised and then not to be, according as mere expediency may seem to dictate. It is obligatory in character as to every situation legitimately invoking its activity. It must be jealously guarded and courageously vindicated upon all proper occasions, if our constitutional system of liberty is to endure.

Those who are wont to regard activity of the court's power mentioned as an unwarrantable, or at least a regrettable, interference with legislative authority, evince want of comprehension of our system of government or want of appreciation of the broad scope of those constitutional limitations designed to guard at all points every individual in the enjoyment of every right essential to those fundamentals: "life, liberty, and the pursuit of happiness" for which "governments are instituted among men, deriving their just powers from the consent of the governed."

The importance of our constitutional restraints and the

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high prerogative power of applying them, is as progressive as is the need for regulation, to the end that such regulation may not overleap its legitimate boundaries and enter the domain of the destructive. It will be a sorry day for our country when the time comes, if it ever does,—let us hope and believe that it never will,—that the invincible weapon—the constitution,—vitalized by an independent and fearless judiciary, shall not efficiently bar excursions into the domain of unbridled interference with individual rights.

If that is more important to any one element in society than to another, it is the weakest, hence the most helpless. So it is of the highest importance to the public, and particularly to the most humble portion thereof, that courts should grapple, willingly and effectively, with every question presented for solution involving validity of legislation on constitutional grounds.

How wisely the fathers must have looked into the future, when—with the evident purpose of their language being regarded as a command from the body of the people to all in authority, so long as the constitution should endure—they penned the words: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

The saying that the court of last resort should willingly apply the test of constitutional limitations, is not to be taken as suggesting judicial desire or haste to declare that not law which has the form of law. In no case should the court enter upon any doubtful ground. It should accord to the coordinate department the highest consideration, not condemning its action so long as any reasonable basis can be discovered for upholding it, but if none can be discovered, not hesitating to put the stamp of judicial disapproval upon it.

The proper attitude indicated deserves, and will doubtless receive, in the end at least, the approbation of the people by

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whom all power was delegated. The judicial disapproval does not nullify law, as the inconsiderate would say. It merely evidences that what is clothed in the mere habiliments of law is not law at all.

Those principles, more often declared in recent years than formerly, are not new. They were laid down by Chief Justice MARSHALL in *Marbury v. Madison,* 1 Cranch, 137, and other cases, where that eminent jurist, in the early days of our constitutional system, gave thereto that vitality essential to its efficiency. He said for the court:

"This original and supreme will organizes the government, and assigns to different departments their respective powers. . . . Those who framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . If then courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."

The idea "that courts must close their eyes on the constitution and see only the law" would give to "the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. . . ." That it "would reduce to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction."

The foregoing observations are not indulged in because of any thought that my brethren, in this case, not appreciating the principles stated, have unduly bowed to legislative authority, paying too much heed to its judgment as to that reasonableness which must be regarded as the infallible test of

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legitimacy of a police regulation. They have set the proper standard in that regard, but failed, in my humble opinion, respecting the question of fact as to what is reasonable beyond any fair doubt, basing their conclusion on misapprehension of the bearing of decided cases.

If this case could rest on the mere question of abstract right, from high moral ideals as to whether a person who is injured in the *quasi*-public work of operating a railroad should have his loss charged up to the industry as a whole, and so added to the cost of things to be consumed in the activities of life, no one would be more ready to take the side of the injured than the writer. Why such losses from an economic standpoint, and a humane view as well, regardless of any question of negligence, should not be treated as legitimate elements of the cost of production and distribution of products for human consumption, would be hard to say, satisfactorily, if at all. The question here is not what ought to be or might be under a different system than that of imposing liability for losses to employees through accidental injuries upon the nearest employers, but what is legitimate under the present system. My general observations are to meet the prejudice which I conceive exists in nonjudicial fields against limiting, by judicial disapproval, the extent of that system, upon constitutional grounds, showing that when duty calls for such disapproval there is no field of discretion within which the judge can operate, though, in the individual case and all of its class, one might wish for a system whereby the wounds of all the injured could be healed and the road now so broad and so frequently traveled to the zone of want, could be absolutely abolished.

The first question as to the constitutionality of the act of 1907 arises under the opening part of sec. 1816 and subd. 1, 2, and 9, quoted in the court's opinion, imposing extraordinary liability upon every railroad company for injuries "to any of its employees," regardless of the branch of service in

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which they may be engaged, except "employees working in shops or offices." I make no question but that there may be classification as to risks and radical changes in common-law liabilities as to members of a particular class, but is a classification of employees of railroads proper which entirely ignores hazards peculiar to railroads, by including in the special group all persons engaged in cutting grass upon the railroad right of way, or building fences, or building bridges, or doing work of construction and engineering, or providing supplies, such as ties and many other things that might be mentioned, even employees in any subsidiary business that might be carried on in aid of the railroad business, an army of persons in the aggregate, having no connection whatever with the operating feature of a railroad, which only is characterized by special railroad risks, and excluding shop employees who are exposed to quite as much hazard of personal injury, and office employees who are as much exposed as many of the included subclasses? Is the mere character of the employer, by itself, a basis for classification, even then excluding a large subclass of employees laboring within, to some extent, the zone of special hazard, and including, as stated, an army of others as far removed from any special risk as employees in any ordinary business? True, the doctrine of classification has been carried by courts so far that the distinction between special and general legislation is very hard to discover, largely nullifying the safeguards against unequal legislation, but is it true that so arbitrary a classification as we have to deal with here is legitimate, under even the very liberal rules we have adopted?

If we, instead of tying closely to some definite rule, look to delusive expressions used in precedents here and there outside this state, not following their history back to discover what they are worth by the light of the real groundwork upon which they are based, and being governed by such groundwork rather than such expressions, which, looked at by them-

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selves, would seem to have been used unconscious of the real premises, there will be no escape from a condition of "classification run mad" which means, in practical effect, no classification at all along definite lines, and the equality clauses of our constitution, state and national, designed to prevent class legislation, in the special sense, will be of no practical effect whatever.

True, courts have laid down as limitations of the power of classification these rules:

1. Classification cannot be arbitrary. It must be based upon substantial distinction which makes one class really different from another.

2. The classification must be germane to the purpose of the law.

3. The classification must not be based upon existing circumstances only, so as to preclude the class opening to let in or let out members.

4. The law must apply equally to members of each class.

5. The characteristics of each class must be so far different from those of others as to reasonably suggest at least the propriety, having regard for the public good, of substantially different legislation therefor. *State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954; *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071; *Bloomer v. Bloomer,* 128 Wis. 297, 107 N. W. 974.

In applying these rules I fully appreciate they furnish only a very general test of what is legitimate, but, nevertheless, they are quite as certain a guide as this or any other court has been able to formulate. Obviously, as has been often said, whether any particular situation falls within their boundaries is a question of fact, and is, as well as the question of necessity or propriety of any proposed regulation, primarily for legislative solution, subject to interference by judicial authority only upon its appearing beyond all reasonable doubt that the boundaries of reasonableness have been over-

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stepped. But the fact that the rules stated furnish only a general test, and that no better can be formulated, and the great importance of not extending the doctrine of classification beyond legitimate boundaries so as to practically nullify the safeguards against unequal legislation,—render it highly important that such general rules should be given a pretty definite and certain meaning, not to be regarded as elastic; leaving only questions of fact to be determined as regards whether a given situation falls within or without the general scope.

We also fully recognize that while classification must not be arbitrary, that has reference to the principles embodied in the rules, not to the boundary of any particular class. That must, of necessity, be definite and in that sense arbitrary.

Again, we fully appreciate that the rule that classification must be based upon characteristics making the particular group so far different from others as to reasonably suggest need for or propriety of special legislative treatment, has reference to the group as such, regardless of whether each and every subject within the group has such characteristics to the same degree as every other subject, or not. But the dominant feature in some perceptible degree must affect substantially all. As said in *Nichols v. Walter,* 37 Minn. 264, 33 N. W. 800, and often quoted with approval here:

> There must be "some apparent natural reason—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."

So the general rules often stated, in substantially the same language, might well be extended by these explanatory rules which, in the cases referred to and many others, have become as well understood as those reduced to set forms of expression.

6. Rules 1 to 5 do not constitute a definite test of legitimacy of classification except as to general characteristics,

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leaving the question as to whether any given situation falls within their boundaries or not, matter of fact.

7. Whether, upon the facts of any particular situation, it falls within the boundary of the rules for classification, is primarily for the legislature, subject to judicial disapproval for unreasonableness beyond any fair doubt.

8. The rule that classification must not be arbitrary refers to the group as such, not to differences in degree in which the individuals of the group are affected by the special circumstances calling for the classification.

There is this further principle to be observed in dealing with this subject which, for the purpose of having a reasonably complete code, so to speak, for testing any legislative enactment, challenged as invading the equality clauses of national or state constitutions, may well be stated.

9. In classification for the purpose of legislative treatment under the police power, it is a judicial function to determine whether the particular subject is within the police power, also whether the act has a real relation to the subject it ostensibly deals with, and whether the manner of treatment is unquestionably unreasonable. *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *Bonnett v. Vallier,* 136 Wis. 194, 116 N. W. 885; *Lawton v. Steele,* 152 U. S. 133, 14 Sup. Ct. 499.

Having placed before us pretty fully, it is thought, the principles by which the law in question must be squared as regards whether it transcends constitutional limitations, let us proceed to make the measurements. I choose to test the enactment in the first instance, at least, by principles, not by mere precedents, which latter method, as before indicated, in case of failure to fully analyze the examples, is liable to lead one astray. That liability, I am constrained to believe, is what, in the main, in this instance, has led my brethren to the conclusion embodied in the judgment from which I dissent.

The purpose of the law was to promote public safety both

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as regards patrons of railway companies and the servants of such companies, and that satisfies the ninth rule as to one feature, to wit: that as to whether it is within the police power, unless the manner of treatment is clearly unreasonable.

The law applies equally to all subjects within the class, and the class is not fixed so as to prevent opening to let in or let out members, satisfying the third rule.

Now how about substantial distinctions between the particular class and others under the first rule, and such differences in situations and circumstances of subjects within such class, satisfying the first and fifth rules? In considering this we necessarily blend the domain of discussion with the eighth rule, that, while the boundaries of the class, as a whole, must be arbitrary, and the differences in situation between the subjects within the class and those without must be significant, the classification must not be arbitrary as regards extending it to classes of individual subjects not in any degree affected by the particular situation or circumstances forming the basis upon which the classification is grounded, though the degree of affection as to individual subjects may widely differ. These three rules, the first, the fifth, and the eighth, and also the second, form one general field which may well be treated as such, since the domain of each rule so blends with that of the others as to render segregation for more particular analysis liable to confuse.

The purpose as stated is public safety, the term "public safety" being used, as indicated, with reference to the particular body of employees and those they indirectly serve; the patrons of the employers. Is it germane to such purpose to extend the classification, not incidentally, but substantially, to put it not too strongly, manifestly, to a very large degree beyond the field of special hazard in view in the purpose to conserve public safety, giving special benefit to an army of employees not affected at all by such special hazard

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or having to do at all with such hazard as regards patrons of the service and laying upon employers burdens accordingly? Face the rule that the difference in situation calling for the special treatment must pervade the class, not with equal degree as to each member thereof, but to some extent as to substantially all, keeping in mind and giving due weight to the impracticability of fencing the class about so accurately as to exclude every one not affected in any degree by the special hazard and include every one so affected. How can the whole be substantially pervaded by the special circumstances if a very large proportion of the employees are not affected at all? To affirm that it can, is to indulge, in my judgment, in a plain contradiction. So plain does it appear, as an original proposition, that I cannot perceive how one could venture to assert the contrary and ground a judicial decision upon it.

The mistake of my brethren at this point, as I view the matter, is in testing the law by the second rule with reference to the mere classification of the employees, instead of the business they are engaged in. If a mining company conducts a store, a farm, and other industries, subsidiary to the primary business, in which subsidiary employments the hazards of personal injury are no greater than like employment by private individuals or corporations, yet the number of the employees therein constitutes as large a proportion of the whole, perhaps, as the number in the specially hazardous branch, would a classification as regards extraordinary liability of the employer for personal injuries to employees, including all the subsidiary employments, be germane to a law having for its purpose public safety as regards extraordinary hazard of mining? The negative seems so plain as to be beyond possible question.

Does not the illustration exactly fit the case in hand and condemn the classification attempted? The special situation and circumstances of railroad employment having to specially do with public safety, is confined to the operating department

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in the moving of cars and trains or work around them, or upon the track, or in some way so as to come, to some perceptible degree, within the zone of special risk, because of being more than ordinarily within the reach of those physical situations to which railroad perils, as ordinarily specialized, are incident.

The difficulty, under the act before us, is not that the large number of employees outside the special zone of hazard are not affected in the same degree by the special circumstances as those within, but is that they are not affected thereby at all, thus rendering the inclusion of them within the group receiving special protection for the public benefit, manifestly arbitrary, and the ostensible purpose to promote the public welfare a subterfuge for the actual purpose of extending a special privilege to a large number of persons without any legitimate common basis therefor.

At this point we may well note that the ostensible purpose of a law does not govern at all in testing it by constitutional limitations. The court may, yea it is its duty, to look behind the mere veil of any law which may appear legitimate, and if, in its substance, it is bad, to characterize it by its substance, not by its pretense. *Mugler v. Kansas,* 123 U. S. 623, 661, 8 Sup. Ct. 273; *Matter of Jacobs,* 98 N. Y. 98, 110; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137.

If anything more was needed to demonstrate, on principle, that the classification is purely arbitrary and so not germane to the purpose to conserve public safety, it is furnished in the exclusion of shop and office employees. Shop employees who, by common knowledge, form a very large subclass, are in some degree within the zone of special hazard. The repair of locomotives, testing them for suitableness for the service, and the performance of other shop duties that might be mentioned, require service to quite a degree within the zone of special hazard.

Upon what ground was this large subclass of employees ex-

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cluded from the peculiar benefits of the enactment, and other large classes, entirely removed from the zone of special hazard, included? I have searched in vain for any possible legitimate ground therefor and so been forced to the conclusion that the exclusion was purely arbitrary and probably unmindful of the constitutional restraints involved.

Of course, the foregoing condemnation could be easily avoided so as to save the law if it were subject to construction and could be held as intended to apply only to employees within the field of special hazard, but that has been rejected, necessarily, by the judgment of the court in holding that plaintiff, a mere fence builder, is in the class affected favorably by the law.

My brethren treat quite cursorily the feature of the law last discussed and say "shop and office employees" were excluded because not within "the unusual dangers and hazards of the business." How can we say that, when the special danger in a large degree by common knowledge does extend to such employees? Again, how can one say that and in the same breath justify the inclusion of many other subclasses of employees, including fence builders, manifestly not exposed to the special dangers at all? I confess I do not understand the logic.

Again, my brethren, it seems, endeavor to escape from the dilemma the shop employee feature of the law presents, notwithstanding the doubtful justification I have referred to, by asserting that if the subclass were improperly excluded that would not invalidate the classification; resting on that mere assertion and a reference without comment to *State v. Evans,* 130 Wis. 381, 110 N. W. 241.

I confess inability to discover anything in that case warranting the reference. The court there merely laid down the principle that, in case of the establishment of a boundary line of classification with general characteristics of those on the side excluded from the special rights granted or duties im-

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posed, differing from those included, warranting the segregation, the fact of some excluded being as worthy, or as much in duty bound to bear the special burden, as those on the other side, does not militate against the legitimacy of such line. Here the case is far different. The general character of the excluded subclass, not mere exceptional instances, calls for the special legislative treatment, quite as clearly as members of the included class, taken as a whole. The decision of the case, as I read it, condemns rather than supports the court's conclusion. It clearly is to the effect that the special class need not include all affected to any degree by the peculiar characteristics, but it must do so as far as practicable, and a plain unnecessary inclusion of a subclass not so affected and exclusion of a subclass so affected is fatal. The language of the opinion is:

"It is suggested that this exemption is improper because these employees may be subjected to hazards or perils equally dangerous to those to which other employees are subjected. . . . That would not invalidate the classification."

It will be noted that the court's logic is not confined to an excluded class, having now and then a member on an equality with members of the included class, but to an excluded entire subclass of a general group, composed of men on the same plane, generally, as the common mass. It seems that, on more mature consideration, my brethren would not wish to adhere to their logic. Would it be legitimate to legislate specially for all cities of the third class, except one or more specially named, or all cities having a population of 10,000 people except one or several specially excepted? Certainly not, on the most familiar principles of constitutional classification. Otherwise room for that special legislation which is illegitimate would be so broad as to nullify completely the fundamental law as to equality.

I have thus shown, it seems, that the law in question plainly offends against governing principles. Adjudications elsewhere which run counter thereto should not be adopted.

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The principles, not the adjudications inconsistent therewith, should prevail. The correct rule, as I understand it, is to make use of precedents to illustrate principles, not to avoid them. When the principles and the precedents conflict it is the latter, not the former, which should give way. I say this conceding for the purpose thereof that the authorities upon which the court rely are out of harmony with the principles, but such want of harmony will disappear as we proceed, and disappear in favor of my dissent.

There is no precedent in our adjudications out of harmony with my conclusion. If it were otherwise, I would not hesitate to contend with the doctrine of *stare decisis* in order to uphold the principles. Which would have to give way would be governed very much by circumstances unnecessary to discuss.

The only case referred to on the subject discussed, decided by this court, is *Ditberner v. C., M. & St. P. R. Co.* 47 Wis. 138, 2 N. W. 69. It is sufficient to say that the question of constitutional classification was not there raised, discussed, or passed upon.

Reference to the decision on that subject is quite misleading, in my opinion. The legislation considered was upheld, solely as a legitimate amendment to corporate charters under the reserve power in the constitution. How that conclusion could have been reached, in view of the fact that there was no intent by the legislature to make any such change, as evidenced beyond controversy by the fact that it referred to foreign as well as domestic corporations, and the fact that no legislative authority exists to deal with the organic law of the former, is not perceived.

The court does not in the instant case attempt to support the legislation as an amendment of corporate charters. Therefore, we need not pursue the subject of the *Ditberner Case* at length. It is sufficient to show that the decision is quite beside the matter it is now cited to support.

It is by no means certain the court, as at present consti-

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tuted, would follow the *Ditberner Case* on the precise point there decided. It is interesting to note that it has been frequently cited in other jurisdictions with the same misapprehension as to the real point decided, as appears in the present instance, looking at language only. I think I am justified in saying, in passing, that the court does not at this time intend to indorse the doctrine that legislation of the sort under consideration can be regarded as an amendment of corporate charters, and does not intend to condemn it, but to leave the subject open for consideration at some future time when the precise point may require consideration.

It is unfortunate, in my view, that the court now says that on the former occasion it rejected the doctrine of *Deppe v. C., R. I. & P. R. Co.* 36 Iowa, 52, respecting the proper basis for classification of railway employees for legislation of the sort in question, since such basis was the subject decided in the latter but was one entirely foreign to the former. The doctrine of the Iowa case, as regards anything heretofore decided by this court as to constitutional law, stands entirely untouched.

My brethren refer to *Mo. Pac. R. Co. v. Mackey,* 127 U. S. 205, 8 Sup. Ct. 1161, in support of their decision. A history of the subject there treated will show that the case should be really regarded as authority to the contrary of such decision. It involved the law of Kansas making every domestic railroad company liable to any person injured by negligence of its engineers or other employees. It was quite general in its terms as regards the risks contemplated. It had received construction by the supreme court of Kansas, where it was sustained only by giving it the construction it had theretofore received by the supreme court of Iowa, from which state it was borrowed after such construction. It was restrained, though broad in its literal sense, to the particular persons exposed to the special hazard of railroad operations, or to the particular risks peculiarly incident to railroading. *Mo. Pac. R. Co. v.*

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Haley, 25 Kan. 35. It was held that the act permitted such construction and required it, as the parent law was so construed prior to its adoption in Kansas. The federal court sustained the law on the ground of the hazardous nature of the business, adopting the construction given thereto by the court from which the case was transferred.

Referring to the Iowa decision we find, unmistakably, that the initial legislation was only saved from condemnation as unconstitutional by restraining it, by quite extreme rules for judicial construction, to acts of persons within the narrow compass of engagement in the operating department characterized by the special hazard. It was said it could not be saved if it were held to extend to persons engaged in constructing the road. That "if it were so construed as to apply to all persons in the employ of railroad corporations without regard to the nature of their service it would be a clear case of class legislation. . . . Hence would be unconstitutional and clearly so."

My brethren also rely on *Minneapolis & St. L. R. Co. v. Herrick,* 127 U. S. 210, 8 Sup. Ct. 1176; *Chicago, K. & W. R. Co. v. Pontius,* 157 U. S. 209, 15 Sup. Ct. 585; *Peirce v. Van Dusen,* 78 Fed. 693, 47 U. S. App. 339; and *Tullis v. L. E. & W. R. Co.* 175 U. S. 348, 20 Sup. Ct. 136. The first followed the case already reviewed, so we read it contrary to the use thereof in the court's opinion. The same is true of the second. It went, unmistakably, upon the construction of the Kansas statute, given by the supreme court of that state, following that of the state from which the legislation was borrowed. Plaintiff prevailed because he was engaged in the peculiarly hazardous occupation of operating a railroad, to which occupation the law was supposed to be restricted. Whether he was within or without the zone of special hazard was the mooted question. The case, as I read it, does not deal with the subject under discussion at all in any other respect. It seems to have been inadvertently cited.

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The fourth case is said to deal with the validity of an act abolishing the defense of negligence of a fellow-servant as to railway corporations and that it extended to the same class of railroad employees as does the law in question and that it was held proper to treat railway employees as a special class, reaffirming the case I have reviewed involving the Kansas law. I cannot understand the case that way at all. The Kansas cases were referred to as warranting special regulations as to specially hazardous occupations, but by way of argument. The law was of a most general nature, applying to all except municipal corporations, as regards particularly specified hazards of a peculiarly dangerous character and other specified risks, out of the ordinary. The court adopted the construction given by the Indiana court in *Pittsburgh, C., C. & St. L. R. Co. v. Montgomery,* 152 Ind. 1, 49 N. E. 582, to the effect that it dealt only with the special hazards peculiar to the business, not with employees regardless of whether they were within the zone of special hazard or not, excluding some within such zone and others not and including others wholly outside thereof, as in the law in question.

The Indiana court, except as hereafter stated, grounded its decision on adjudications of the supreme court of Kansas, Iowa, and Minnesota and the approval thereof by the federal supreme court under the rule that the construction of a state statute by the highest court of the state will be followed by the federal court as to cases arising in such state, each and all of which decisions are of the character of those heretofore referred to. *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, and the *Ditberner Case* were referred to, neither of which dealt with the subject of constitutional classification at all, as we have heretofore seen.

Thus it appears plainly the learned Indiana court did not discover the real basis for the decision in either of the cases cited, though the fact remains that it sustained the law and the federal court followed its decision upon the theory that

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it dealt only with a class including all within the zone of peculiar hazards and not including others. The point being made in the Indiana court that the law included many corporations whose business was not characterized by any hazard other than those incident to the same business conducted commonly by natural persons, the court declined to deal with the question, holding that the law was good in any event as to railroad companies. Whether that was sound or not may admit of some doubt.

At this point, following the order of the court's treatment, we reach a further reference in the opinion to the subject of shop and office employees, and their exclusion is justified upon the authority of numerous cases cited, including *Minneapolis & St. L. R. Co. v. Herrick, supra; Chicago, K. & W. R. Co. v. Pontius, supra;* and *Pittsburgh, C., C. & St. L. R. Co. v. Montgomery, supra.* I need not pursue that branch of the case. Suffice it to say the opinion does not point out their application. How they justify exclusion of a subclass which is largely within the field of special hazard dealt with and inclusion of other subclasses which are not, my reading fails to discover. So far as they touch the subject they all go back by a path, unmistakably marked, to the Iowa decision sustaining such legislation within the zone of special hazard as the only legitimate basis of classification and the only way of saving it from invalidity. That is so, as we have seen, as to all cases we have referred to.

The same is true with the court's additional citation, *Georgia R. & B. Co. v. Miller,* 90 Ga. 571, 16 S. E. 939. There was no question of exclusion and inclusion disregarding hazards, as in this case.

A further additional citation, *Atchison, T. & S. F. R. Co. v. Matthews,* 174 U. S. 96, 19 Sup. Ct. 609, deals solely with the validity of a law allowing attorney's fees in addition to damages in case of recovery under a statute designed to penalize corporations for violating police regulations as regards

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setting fires. The federal court simply followed the decision of the state court, but in any event the case has too remote a bearing here, if any at all, for me to appreciate it.

I have now reviewed all of the supports relied upon for the conclusion from which I dissent, on the subject of constitutional classification. The entire group of citations are referable to *Deppe v. C., R. I. & P. R. Co.* 36 Iowa, 52,—which they expressly, directly or indirectly, follow,—conceded by my brethren to be contrary to their conclusion. They failed, as it seems, to discover that the decision of the supreme court of Kansas, adopted by the supreme court of the United States, merely upheld the Kansas law with the construction given thereto by the Iowa court.

My brethren disregard without difficulty *Lavallee v. St. P., M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Johnson v. St. P. & D. R. Co.* 43 Minn. 222, 45 N. W. 156; *Pearson v. C., M. & St. P. R. Co.* 47 Minn. 9, 49 N. W. 302; *Weisel v. E. R. Co.* 79 Minn. 245, 82 N. W. 576; and *O'Niel v. G. N. R. Co.* 80 Minn. 27, 82 N. W. 1086. But the Minnesota law was quite as sweeping in its provisions as ours, omitting the feature of the latter as to shop and office employees. It was construed the same as the Iowa law and the Kansas law and sustained upon the same ground as they were sustained. It seems my brethren do not give proper dignity to those cases by merely suggesting that the basis for classification was held to be the extraordinary hazard to employees. I think in that there is confusion between purpose of the law and the element of being germane to the purpose. The purpose of all such laws is public safety. The basis of classification has regard to the element of adaptation. The decisions which are supposed to support the conclusion this court has reached, as well as the others, all make the special hazard the basis for the classification. They all deal with a single class of legislation and are in harmony.

True, the Minnesota court said, "The manifest purpose

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was to give the benefit to employees engaged in the hazardous business of operating railroads." Can there be any possible question but that the purpose of the act in question is to give special benefits to the same class and to others? The fact that the special benefits, in a sense, penalize the employers, and so operate to the benefit of the people generally as regards safety, does not militate against the fact that the primary benefit in the mind of the legislature was to employees. I see no escape from the conclusion that all these cases support the conclusion I have arrived at on principle alone and are in perfect harmony, leaving no room to reject some and adopt others.

The foregoing covers all ground traveled over by the court to its conclusion. I might safely, I have shown, rest my contrary conclusion on the precedents the court relies on if precedents alone were to govern. It was no fault of the learned counsel for appellant that the court did not take notice that the starting point of all the judicial authority referred to by respondent's counsel and the court is *Deppe v. C., R. I. & P. R. Co., supra.* These further cases cited by appellant's counsel from other states, also based on the logic of the Iowa case, were not referred to in the court's opinion. *Bradford C. Co. v. Heflin,* 88 Miss. 314, 42 South. 174; *Ballard v. Miss. C. O. Co.* 81 Miss. 507, 34 South. 533; *Beleal v. N. P. R. Co.* 15 N. Dak. 318, 108 N. W. 33. The gist of all is in the early Iowa case.

The upshot of the foregoing is that if the act in question could be sustained at all, it would have to rest on a preliminary construction of the statute in harmony with the numerous decisions referred to. I see no way to reach the preliminary construction because of the plain, unmistakable purpose in the act to include all employees regardless of whether operating strictly within the zone of railroad risks or not, with the exception noted, and that exception necessarily negatives any theory that any other employees are excluded under the

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canon of construction *expressio unius est exclusio alterius.* As the injured person here was a mere fence builder and so not injured by any peril, properly denominable as a railroad risk, the complaint fails to state a cause of action under the universal rule for construction of such statutes as ours, where so framed as to be open to construction. Therefore, from any viewpoint the pleading can be reasonably measured it fails, utterly, in my judgment, to state a cause of action.

The decision upholding the third subdivision of the law upon the theory that it is a mere declaration of the unwritten law, I cannot subscribe to. True, we should not declare a law unconstitutional if a construction of it can be reasonably given which will avoid that result, but just as true a law not open to construction should never be varied in its plain, ordinary sense by an effort to construe it. It is only where uncertainty of sense begins that the office of judicial construction can properly become active. Further, just as true it is a canon of construction that it is to be presumed in the enactment of a law that the legislature intended some change in existing law, written or unwritten, or to make a new regulation of some sort. Any construction is to be avoided which would convict the lawmaking power of merely spreading a collection of words on the record in the form of a law, but in fact meaning nothing, if any rational view can be taken of the enactment leading to a different result. Again, in construing a law, after discovering ambiguity justifying it, the court should look, among other things, to its reason and spirit and read it according to the intent, if that can be discovered, expressed within the broadest reasonable scope of the words used; the fair, ordinary meaning of such language, however, to be taken, unless it appears clearly that some other was intended. All these principles are so familiar that citation of authority in support of them is unnecessary.

In face of the principles stated and the common knowledge that at the time of the enactment there was more or less sentiment against courts exercising the judicial power to take

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cases from juries on the question of contributory negligence, upon such a question appearing by the evidence to be one of law only, the purpose of the legislature is quite plain. The state of public mind suggested, whether reasonable or not, we need not take time to discuss. Considerable unrest under the administration of the law in that regard existed going to the extent of suggesting that courts were prone to usurp the functions of the jury. It was not appreciated, it is thought, that the question of whether evidence shows contributory negligence beyond any reasonable view to the contrary, was never a jury question, and that no trial court could hold to the contrary without a breach of judicial duty. In that light and in the light of the plain letter of the enactment in question and the rules we have referred to, I could not, if I would, escape the conclusion that the legislature intended to, and supposed that it could, take from courts a power they had been accustomed to exercise in the ordinary performance of their duties under the plain mandate of the fundamental law.

Can there be any mistaking the meaning of the words, especially in the light of what has been said:

"The court shall submit to the jury the following questions: *First,* whether the company . . . was guilty of negligence directly contributing to the injury; *second,* if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; *third,* if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company . . . ; and such other questions as may be necessary."

Discretion was left, it will be noted, as to "such other questions" but none as to the special questions covering the vital points of negligence. So looking at the legislative effort, all would agree that it is a usurpation, though an innocent one of course.

I would be exceedingly slow in reaching a conclusion that

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the legislature intended to pass an unconstitutional law. In all my experience as a lawyer and judge, covering a period of nearly forty years, I have never known of an instance of such an effectuated intent and do not expect to meet with any in the future. It was a mistake, in my judgment, that is all. Nevertheless, it evinces that the entire enactment was allowed to take the form of law without being subjected to careful legislative scrutiny in the light of constitutional tests. To some extent, I should say, the rule applies to such a case, that in case of a court's conclusion of fact based on a wrong rule of law, the ordinary presumption of its correctness does not obtain. So when the legislature makes a law, so called, not taking note that its power is limited, its judgment on the basis entitling it to controlling significance within all reasonable bounds, is not incorporated into the work.

The view the court took of the act rendered it unnecessary, as was supposed, to consider subd. 8, providing that in case of an action in this state to enforce liability for an injury occurring in a sister state, the defendant shall not be permitted to plead or prove the decision of the latter state as a defense. The view I have taken rather calls for such consideration, but it may be done briefly. The provision was copied substantially *verbatim* from the law of Indiana. Doubtless it was borrowed, overlooking the fact that January 17, 1902, and prior to the adoption here, the supreme court of Indiana held that it was clearly an unconstitutional interference with property rights. The logic of the court's opinion on the subject is unanswerable. When a person is injured in a sister state through breach of duty by another as regards his personal safety, such person becomes vested, at once, with such rights of action to remedy the wrong as the law of such sister state affords and none other, and, in case of his death, the rights of personal representatives are likewise restricted. The action being transitory, the defense is likewise transitory. The two necessarily, upon familiar principles, go to-

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gether. A law of a state other than that of the injury, allowing prosecution of an action for the wrong upon a different basis than the right and preventing the use of a vested defense, is confiscation. That doctrine has support in our own decisions, in the decisions of the federal supreme court, and in the general trend of authority. *Second Ward Sav. Bank v. Schranck,* 97 Wis. 250, 73 N. W. 31; *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488, 76 N. W. 359; *Eau Claire Nat. Bank v. Macauley,* 101 Wis. 304, 72 N. W. 176; *Pritchard v. Norton,* 106 U. S. 124, 1 Sup. Ct. 102; *Hovey v. Elliott,* 167 U. S. 409, 17 Sup. Ct. 841.

The parts of the law thus invalid, as I think, leave nothing which the legislature would have enacted independently. Therefore, upon familiar principles the enactment is wholly void.

It is interesting to note that in any event the law may be very short-lived. The federal supreme court in the *Employers' Liability Cases,* 207 U. S. 463, 28 Sup. Ct. 141, held that a law which includes employees engaged in interstate commerce is as to that feature a regulation of such commerce. The federal law was condemned because it dealt with all employees of a railroad doing interstate business whether engaged at the time of the injury in such business or in intrastate business, and that the two features were inseparable. Hence the whole was held unconstitutional. Following the same line of reasoning, this court has very recently held that an act limiting the hours of labor of railway telegraphers of a railroad company doing both interstate and intrastate business, is necessarily a regulation of interstate commerce, as the two kinds of business done by the same employees are inseparable; hence that it is unconstitutional, Congress having already occupied the field as to interstate commerce and by a law materially different from the state law.

Since April 22, 1908, the same situation we dealt with regarding telegraphers has existed as to injuries to railway em-

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ployees. On that day Congress passed an act, supposed to be free from the infirmity which led to condemnation of the one in the *Employers' Liability Cases* and thereby as to personal injuries to railway employees received in the course of their service in interstate transportation, occupied the field under the commerce clause of the constitution. The law (see 35 U. S. Stats. at Large, 1907–8, p. 65) conflicts in a radical degree with our state provision. The two may not be able to stand together under the logic of the decision in the *Telegraphers' Case* (*State v. C., M. & St. P. R. Co.* 136 Wis. 407). Whether such legislation will not wholly displace our state act is in sight, but not for decision at this time.

We now close this rather lengthy, but I trust not too lengthy, opinion. The vast importance of the question at issue seemed to justify the extensive treatment I have devoted thereto. With the amount of labor we have, work of this independent sort would not be entered upon other than under the stimulus of a supposed command of duty. The learned counsel for appellant and counsel for respondent as well, presented the case with distinguished ability and helpfulness. In my view, as indicated, the position of appellant is grounded on principle and on a long line of well-reasoned judicial authority with which there is, substantially, no conflict. So believing, it seemed a duty to the court, to the profession, and to the administration of the law generally, to express fully my views. I will say here, as on another occasion for the court, we do not doubt but that the very best of intentions were the mainspring of the enactment in question, but good intentions can never save a legislative effort if the paramount law condemns it. The constitution was made to guard the people against the dangers of good intentions as well as bad intentions and mistakes. The former may excuse a void enactment, but never justify it.

It is never a pleasant duty to perform, to condemn a law as void. The dignity of the legislative office is high. Co-

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ordinate branches of the government owe great deference thereto while maintaining the dignity of their own field of activity. It is upon co-operation of the three grand divisions of our governmental system upon that high plane, each doing its duty firmly and submitting cheerfully to the authority of the other within the constitutional scope thereof,—that we must rely for that strong, efficient government which the fathers endeavored to establish by a constitution, which deserves our most distinguished consideration as an ideal declaration of principles essential to the purpose declared in its opening lines.

Perhaps it is unnecessary to close with the statement that it is my opinion the demurrer should have been sustained.

The following opinion was filed April 24, 1909:

WINSLOW, C. J. (*concurring*). While I heartily agree with the opinion of the court in this case, I deem it proper, in view of the importance of the case, to add a few words of my own in order to express in my own way the grounds upon which I understand the decision to be based.

The main contention of appellant is that the law is unconstitutional because not confined to those employees who are actually engaged in operating trains or incurring risks peculiar to the railroad business. The claim is that there can be no classification except a classification of employees based upon the character of the risk incurred. There is doubtless much authority which justifies this claim. Such was unquestionably the controlling idea when laws of this nature first made their appearance on the statute books. Many such laws were confined by their terms to injuries resulting from hazards peculiar to the railroad business, and some were upheld only because the courts were able to construe them as intended only to cover injuries resulting from such hazards. Whether the last-named courts would now feel required to so

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construe such laws in order to sustain their constitutionality may be doubtful. I think not, and for this reason:

Railway corporations engaged in the business of common carriers have been classified and subjected to peculiar and special legislation from the earliest times, and properly so. Their situation and the peculiar character of their business and its relation to the public safety demand special legislation. This law, therefore, in classifying railway carriers and subjecting them to different liabilities, only follows many other laws whose constitutionality never has been questioned. Viewed in the light of a classification of railway carriers rather than as a classification of employees or dangers, there seems to me no reason why it should not be sustained without difficulty. Railway carriers conduct a business unique in its dangers, both to their employees and to the public, and are charged with unique liabilities to the entire public. These are considerations which suggest or demand special and peculiar legislation; and this legislation may well be along the lines of an increased liability for the negligence of their own employees, not only in the operation of trains but in all the railway business.

From the fence repairer to the locomotive engineer, practically every railway employee is doing something upon which depends not only the successful operation of the railroad but the safety of the passengers who ride over it. The fence repairer in the present case was engaged in assisting in making travel over the road safe from the danger of collision with animals. He was performing a duty to the public with which the railroad is charged. The man repairing fences on a farm is performing no such duty. Herein lies the distinction between the two acts, and herein lies, also, the reason which calls for special legislation requiring higher care on the part of the railway company in the selection of all of its employees, and imposing greater liability for the acts of employees than is required of an ordinary employer.

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In a word, it is proper to subject railway carriers to a higher degree of liability for the neglect of their servants, not simply because the business has peculiar dangers, but because it bears a peculiar relation to the safety of the public which no other business bears, and hence greater diligence in the selection of its employees may justly be demanded and enforced by means of a law imposing a heavier liability than that imposed on ordinary employers. This principle was, I think, fully recognized in the *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, where the federal law which attempted to make an interstate railway carrier liable to any of its employees for injuries resulting from the negligence of co-employees, notwithstanding slight contributory negligence, was under consideration. It is true that the law was held void, but only on the ground that it covered intrastate commerce as well as interstate commerce, and hence was beyond the power of Congress to enact. Otherwise the law, which covered by its terms all employees, was practically approved. Mr. Justice WHITE, who wrote the opinion of the court, says that if the law applied to the District of Columbia and the territories only it could not be questioned, because the legislative power of Congress over these regions is plenary and not dependent on the interstate commerce clause of the constitution. Mr. Justice MOODY, in his dissenting opinion, says:

"It is rather startling to hear that in enacting laws applicable to common carriers alone Congress has made a capricious and arbitrary classification. From time immemorial the common law has set apart those engaged in that business as a peculiar class, to be governed in many respects by laws peculiar to themselves."

Thus it is seen that the supreme court of the United States, in treating of a law substantially identical with the law before us, regarded it as a law classifying railway carriers and not as a law classifying laborers. In this view I can see no difficulty with the main provision of the law, which makes

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railway carriers liable to an employee who may be injured by the negligence of a co-employee. It is a classification of railway carriers which is reasonably suggested, if not demanded, not merely by the peculiar risks incurred by the employee, but by the highly important duties which the railway companies and their employees are in duty bound to perform for the safety of the public.

As to the exclusion of shop and office employees a different question arises. It is undoubtedly true there may be classification among employees, if the circumstances of the employment are so far different as to suggest the propriety of classification. As a general rule, shop and office employees are in less danger from the negligence of their co-employees, and perform duties less directly connected with the safety of the traveling public, than train employees and construction or repair gangs. The legislature deemed the difference in duties sufficient to exclude shop and office employees from the provisions of the law, and the court would not be justified in holding that the legislature was wrong in its judgment.

Upon a motion for a rehearing there was a brief for the appellant by *H. O. Fairchild,* attorney, and *Burton Hanson* and *C. H. Van Alstine,* of counsel, and a brief for the respondent by *Minahan & Minahan.*

The motion was denied March 9, 1909.

BORING, Executor, Respondent, vs. OTT, Appellant.

November 30, 1908—March 9, 1909.

Judgment obtained by perjury: Restraining enforcement: Degree of proof required.

1. Equity will restrain the enforcement of a judgment obtained solely by fraud and perjury of the successful party if the defeated party was not guilty of any negligence or laches.

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2. The enforcement of a judgment regularly entered after a trial in a court of law should not be restrained in equity unless the ground for interference is established beyond all reasonable controversy by evidence clear, convincing, and satisfactory.
3. The evidence in this case is *held* insufficient, under the rule above stated, to establish the fraud and perjury alleged.

MARSHALL, J., concurring in the result, is of the opinion that in such a case the facts should not be required to be shown by any higher degree of proof than, as in ordinary cases of fraud, by clear and satisfactory evidence; that the proof was sufficient in this case; but that, in order to be ground for relief, the fraud must have been extrinsic and have directly induced the judgment, and that the mere fact that the judgment was obtained by perjured testimony does not warrant equitable interference.

APPEAL from a judgment of the circuit court for Ashland county: E. W. HELMS, Judge. *Reversed.*

This action was brought to perpetually enjoin the defendant, *Eli Ott,* from further prosecuting an action in which *Ott* was plaintiff and the plaintiff herein defendant in the circuit court for Ashland county, and enjoining the entry and enforcement of collection of such judgment or any part thereof out of the estate of F. J. Pool, deceased, and for other relief, which judgment was ordered by this court in *Ott v. Boring,* 131 Wis. 472, 110 N. W. 824, 111 N. W. 833, where the facts upon which judgment was ordered are stated. The grounds of action to restrain the entry and collection of this judgment are that the contract between Pool and *Ott,* made in 1887, and upon which the judgment sought to be enjoined in this action was founded, was rescinded and canceled by mutual agreement between Pool and *Ott* in 1889, fifteen years before Pool's death, and that *Ott* concealed such fact from Pool's representatives, to whom it was unknown, and after Pool's death asserted his claim against the estate of Pool under such contract which he represented to be in force and valid against the estate, and by fraudulent representations imposed upon and deceived the representatives of Pool and the court and secured a judgment by fraud and perjury which was not discovered until the rendition of the judgment

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of this court heretofore referred to, although every reasonable effort to discover the same was made. *Ott* answered, denying generally the material allegations respecting misconduct and rescission, and set up the decision in *Ott v. Boring,* former action, as a bar, and also pleaded lack of diligence in former action.

On the trial of this action the court found as follows:

"That in the fall of 1889 the defendant, *Ott,* was discharged by the late Franklin J. Pool from his employ, and a few days later was re-employed by said Pool solely as a clerk, at a salary of $15 per week. That at the time of such re-employment the written contract or letter of October 17, 1887, was by agreement between them, as a condition of such re-employment, mutually canceled, rescinded, and abrogated, and said *Ott* voluntarily then surrendered up and waived all his rights under the same.

"That soon after the death of said Pool in July, 1904, said *Ott,* concealing the fact of such surrender and cancellation from the family of Pool and from the plaintiff, set up a claim under said contract of a quarter interest in the store business left by Pool, and filed with the county court his verified claim for such interest against said Pool's estate. That in the county, circuit, and supreme courts he asserted in his action thereon against said estate that he was entitled to said interest under said written letter or contract, and concealed the fact of such rescission and cancellation and imposed the said agreement upon the estate and court as valid, and thereby procured a decision of the supreme court in his favor sustaining and upholding his said claim. Such decision was rendered February 19, 1907. 131 Wis. 472, 110 N. W. 824, 111 N. W. 833. That said verification of his claim as a valid one, and concealment of said surrender and cancellation, under the circumstances, was a fraud upon said estate and upon the court.

"That prior to August, 1904, when said *Ott* presented said claim to the family of said F. J. Pool, the family and heirs and executors of said Pool and their attorneys did not, nor did any of them, know, and had never heard, of the existence of said agreement of October 17, 1887. That in August, 1904, was the first time they or any of them ever learned of its existence.

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"That between February 19, 1907, and February 22, 1907, the plaintiff's attorneys for the first time discovered that said agreement or letter of October 17, 1887, had been surrendered and canceled in the lifetime of said F. J. Pool, and prior to February 19, 1907, neither the family or heirs of said Pool or the executors of his estate, or their attorneys, or any of said persons, had known or learned, or had any means of knowing or learning, anything of that nature, and had no reason for believing that any such fact existed.

"That prior to the trials which were had in the county and circuit courts upon said *Ott's* claim the said executor and his attorneys used all reasonable and due diligence to ascertain any and all facts bearing upon the validity of said claim, and ascertained everything which was then ascertainable, and were not negligent in failing to discover the fact of said cancellation which afterwards came to light.

"That after the discovery of said new facts between February 19, 1907, and February 22, 1907, the said executor or his attorneys were not guilty of negligence in not applying to the supreme court within thirty days from its decision for an enlargement of its mandate upon the facts then within their possession or in not applying to the circuit court for a new trial under the statute.

"That the issue involved in this action was not involved, tried, and passed upon in the former action of *Ott v. Boring,* determined as aforesaid by the supreme court on February 19, 1907. 131 Wis. 472, 110 N. W. 824, 111 N. W. 833."

And as conclusions of law the court found:

"That in suppressing and concealing the fact of cancellation of said contract said *Ott* procured the judgment in his favor in said former action by fraud.

"That the plaintiff is entitled to an injunction against the defendant perpetually restraining and enjoining him, his heirs, executors, administrators, and assigns, from in any manner enforcing, or taking any steps to enforce, the judgment in his favor rendered or entered or to be entered in this court under the mandate of the supreme court under said decision of February 19, 1907, in said action of *Ott v. Boring,* as executor, and to have the lien of the same set aside as a cloud upon the title to any real estate left by said F. J. Pool, deceased, upon which the same might ap-

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pear to be a lien, and with leave to the plaintiff to apply to the court for a further decree upon the foot of the judgment compelling the defendant, *Ott,* to satisfy said judgment in whole or in part, if such relief should become necessary to protect the plaintiff or the estate of said F. J. Pool therefrom."

Judgment was rendered in favor of the plaintiff in accordance with the findings, from which judgment this appeal was taken.

For the appellant there were briefs by *Sanborn, Lamoreux & Pray* and *H. B. Walmsley,* attorneys, and *Burr W. Jones,* of counsel, and oral argument by *Mr. F. B. Lamoreux, Mr. Walmsley, Mr. Jones,* and *Mr. A. W. Sanborn.*

Richard Sleight, attorney, and *James G. Flanders,* of counsel, for the respondent.

The following opinion was filed January 26, 1909:

KERWIN, J. 1. Counsel for appellant seasonably objected to any evidence under the complaint for the reason that it did not state facts sufficient to constitute a cause of action. The court overruled the objection, and this ruling is assigned as error. The basic ground upon which equity is invoked to restrain execution of the judgment is the alleged fraud and perjury in presenting and maintaining the claim against the estate of Pool when no such claim existed, because the original agreement between Pool and *Ott* had been canceled and rescinded and the appellant continued in the employ of Pool under a contract of service only. The ground upon which the plaintiff's complaint can be sustained, if at all, is based upon the allegations of perjury in verifying the claim and sustaining it by committing perjury, diligence on the part of plaintiff on former trial, and failure to discover such fraud and perjury in time to be available in the former action. The claim was presented in the county court, disallowed, case appealed to the circuit court, general denial, statute of limitation and payment pleaded, there disallowed, and on appeal to this court reversed, and judgment ordered for

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Ott. After reciting the facts leading up to the reversal by this court in *Ott v. Boring,* 131 Wis. 472, 110 N. W. 824, 111 N. W. 833, the complaint in the present action sets up facts showing rescission and cancellation of the old contract, promise of surrender by *Ott,* making of the new agreement by which *Ott* agreed to continue in the employ of Pool on a salary, the alleged false claim that the old contract had been lost, concealment of it until after Pool's death, and intent to defraud the estate of Pool by the false claim that the contract was still in force, wilfully testifying thereto, and thus obtaining the judgment by fraud and perjury, which this action is brought to enjoin.

It is strenuously insisted by appellant under this head that the former judgment is conclusive upon the parties to this action and cannot be questioned in the instant case; while on the part of the respondent it is insisted that the alleged rescission, cancellation, and perjury committed by plaintiff not having been discovered until after judgment in the former action, such question was not in fact litigated and therefore cannot be held conclusive upon respondent. It is said that release and rescission are new matters and must be pleaded, and, not having been pleaded or known to respondent at the time of the former trial, he is not precluded by the judgment upon such issues. Of course the doctrine is too well settled in this court to require citation of authority that the parties to an action are not only concluded by the judgment on all matters litigated, but all that might have been litigated between them upon the subject matter of the suit, so that all defenses to the cause of action sued upon, whether set up or not, are concluded by the judgment in the same action. This general rule does not seem to be denied by respondent's counsel, but they contend that where a new defense arises not known to the parties at the time of former trial and which with reasonable diligence could not have been discovered, and which renders it inequitable and unconscionable to permit the other party to retain the fruits of a victory

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acquired by deceit and fraud, the general rule does not apply, but that equity will take hold for the purpose of granting relief. This subject was very fully considered in *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433, and it was there held that the bill of review under the old practice no longer obtains under the Code, but that the Code provides a complete system in itself, and that relief, therefore, from a judgment under our practice must be obtained upon the grounds and in the manner prescribed by the Code. Sec. 2879, Stats. (1898), limits the time within which a motion for a new trial may be made on the ground of newly-discovered evidence to one year from the date of verdict or finding. This statute, however, does not deprive a defrauded party of remedy in a proper case. In *Stowell v. Eldred,* 26 Wis. 504, 507, 508, this court said:

"The rule seems to be quite well settled that chancery will relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense by fraud or accident, or the acts of the opposite party unmixed with negligence or fault on his part."

The foregoing language is approved in *Crowns v. Forest L. Co., supra,* and other decisions of this court. In referring to this subject in *Nye v. Sochor,* 92 Wis. 40, 65 N. W. 854, this court holds that relief in equity may be had against a judgment obtained by fraud, mistake, accident, or surprise unmixed with laches or negligence on the part of the suitor asking relief, and that perjury in obtaining a judgment is sufficient ground for equitable relief where the party applying for relief is without fault. When a proper case is made, an action may be maintained to restrain the enforcement of the judgment. In such cases the action is not for a new trial or to review the judgment, but is directed against the party claiming under the judgment to prevent the execution of it.

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So in the present action the judgment is conclusive upon the parties to it and upon the subject matter litigated, and relief can be had only in a direct action upon facts showing a right to enjoin its execution. *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433; *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132.

The general rule laid down in the leading case of *U. S. v. Throckmorton,* 98 U. S. 61, applicable to this class of actions is perhaps not broad enough to cover all cases which might arise where a court of equity would enjoin the enforcement of a judgment. In fact it would be difficult to formulate any general rule sufficiently comprehensive and accurate to fit all cases. The *Throckmorton Case* probably comes as near to stating a general rule applicable to cases of the class under consideration as any in the books. In that case it is said:

"The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

This court approved the *Throckmorton* rule in the case of *Uecker v. Thiedt,* 133 Wis. 148, 113 N. W. 447, and others, but it was not its intention to exclude all cases not coming within the *Throckmorton* rule. To do so would be in conflict with other decisions of this court later considered. Even the *Throckmorton Case* does not assume to go farther than to state a general rule, and, after stating several instances where equity will take jurisdiction, continues:

"There is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being

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kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and a fair hearing."

Just what fraud "extrinsic or collateral" is sufficient to warrant a court to act is not very clearly defined under the authorities, and, as before observed, necessarily so from the difficulty of prescribing a rule.

It will be seen that the United States supreme court in a later case went a step farther than it did in the *Throckmorton Case* and extended the rule to any case where from the facts it appeared to be against conscience to permit the execution of a judgment. *Marshall v. Holmes,* 141 U. S. 589, 12 Sup. Ct. 62. In the above case the fraud consisted in the use of a forged letter in obtaining a judgment, which was not discovered within time to be available by a new trial, and but for the use of such letter the judgment would not have been secured. The court said:

"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery"—citing several authorities, including the *Throckmorton Case.*

In *Pico v. Cohn,* 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, relied upon by appellant, where the *Throckmorton* rule is approved, the court lays down the doctrine that in some cases a former judgment may be annulled for fraud; and it will be seen by an examination of the authorities that it is not easy to determine what frauds may be regarded extrinsic or col-

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lateral to the matter tried by the first court. The reason of the rule seems to be based upon the idea that there must be an end to litigation, and therefore an issue which has been tried and passed upon by the first court should not be retried in an action to enjoin the judgment; otherwise, litigation would be interminable. While the issue might have been litigated and in a sense was, because the continued existence of the contract was the basis, at least in part, of the recovery, still the fact that there was no adversary trial upon the issue of rescission which would have been a defense if established in favor of *Boring* is an element which should appeal to the conscience of the chancellor in determining the right to equitable relief. In the *Throckmorton Case* it is said the fraud must be "extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." It is not easy to see, however, why an issue determined in favor of the prevailing party solely by perjury does not amount to such a fraud, where such perjury was unknown to the defeated party and could not by the exercise of reasonable diligence have been discovered. It would seem that a judgment thus obtained is as unconscionable as one secured against a party by keeping him away from court or by other corrupt means and thereby preventing a fair trial upon the merits. *Marshall v. Holmes,* 141 U. S. 589, 12 Sup. Ct. 62; *Tucker v. Whittlesey,* 74 Wis. 74, 41 N. W. 535, 42 N. W. 101; *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229; *Johnson v. Huber,* 106 Wis. 282, 82 N. W. 137; *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132; *Stowell v. Eldred,* 26 Wis. 504.

While in *Crowns v. Forest L. Co., supra,* the question was one largely of procedure, the court in no uncertain terms stated that the new procedure under the Code does not "attempt to divest the courts of the jurisdiction they formerly possessed to protect the rights of parties when fraud had in-

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tervened," but that the remedy must be pursued in the manner prescribed by the Code. The court said:

"Courts of equity under the old *regime* had the power of control over the parties, and would prevent them from asserting rights based upon judgments tainted by fraud or covin. That power exists today, but it must be invoked and enforced in harmony with the true spirit and in accordance with the positive requirements of the new order. . . . But suppose, as in this case, the facts upon which the fraudulent character of the transactions resulting in the judgment sought to be attacked depends were not discovered until the expiration of the year, is the party without remedy? While it may rightly be said that the ground upon which defendants seek relief is newly-discovered evidence, yet it is evidence showing fraud and collusion, concealed by the parties to it, and which, it is claimed, has resulted most harmfully to the defendants. This was a favorite subject of relief in equity."

In *Zinc C. Co. v. First Nat. Bank, supra,* this court, speaking upon the subject respecting an action to enjoin a judgment, said:

"In such independent action the complaint may be spoken of as a bill in the nature of a bill of review, in the sense that it is the pleading on the part of a plaintiff to accomplish, in effect, the purpose of the former bill of review. Strictly speaking, bills of review and bills in the nature of bills of review, as such pleadings were known to the old chancery practice, are not known to the Code."

And, after discussing the limitations upon motions to open judgments, the opinion proceeds:

"Neither does the limitation upon proceedings by motion to open a judgment upon some ground going to the right of plaintiff to the relief granted militate at all against jurisdiction in equity to protect a person from a judgment obtained against him by fraud."

This court again had occasion to consider this subject in *Balch v. Beach, supra,* and we cannot do better than quote from the opinion:

"A court of equity has jurisdiction to relieve against a judgment upon the ground that it is contrary to equity where there is no other remedy, upon several different grounds, and

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among them fraud upon the party seeking the relief by the person who obtained the judgment, such party not being guilty of any inexcusable ignorance or negligence in the matter. *Stowell v. Eldred,* 26 Wis. 504; *Barber v. Rukeyser,* 39 Wis. 590; *Hiles v. Mosher,* 44 Wis. 601; *Johnson v. Coleman,* 23 Wis. 452; *Nevil v. Clifford,* 55 Wis. 161, 12 N. W. 419; *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433. The jurisdiction of equity is not exercised to disturb a judgment. That can only be done according to methods provided by the Code. But it acts directly upon the party who is in a position to and might, if not restrained of his liberty, enforce the judgment, tying his hands so as to prevent him from doing so, thus leaving the judgment good in form but valueless and harmless in fact. *Crowns v. Forest L. Co., supra; Zinc C. Co. v. First Nat. Bank,* 103 Wis. 135, 137, 79 N. W. 229; *Johnson v. Huber,* 106 Wis. 282, 82 N. W. 137; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571. . . . Above all and over all is the supreme principle to which the vigilant, clean-handed, but wronged, party may resort when all legal remedies fail, and even precedents for an equitable remedy also, fitting the situation with exactness as to facts,—that equity suffers no wrong to go without a remedy, the wrong being of sufficient gravity to be appreciated by the conscience of the chancellor, and application being made to its jurisdiction seasonably and with clean hands. Its power and mastery of invention and the flexibility of its arm enable it to fit an infinite variety of situations successfully where otherwise wrongs would go unrighted. Pomeroy, Eq. Jur. 109. Its administration is guarded and guided by precedents, which, by judicial policy, fence in its operations more or less closely according to subjects; but in its nature it is expansive, and so may break away *ex necessitate* and set a new mark to meet a new situation, and does not hesitate to do so when otherwise just rights would fail of vindication. *Land, L. & L. Co. v. McIntyre,* 100 Wis. 258, 75 N. W. 964."

The court in *Stowell v. Eldred,* 26 Wis. 504, held that equity will restrain the execution of a judgment obtained by perjury, and the rule there laid down has never been departed from, but repeatedly approved in subsequent cases by this court. *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132; *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433; *Barber*

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v. Rukeyser, 39 Wis. 590; *Hiles v. Mosher,* 44 Wis. 601; *Nye v. Sochor,* 92 Wis. 40, 65 N. W. 854; *Jilsun v. Stebbins,* 41 Wis. 235; *Tucker v. Whittlesey,* 74 Wis. 74, 41 N. W. 535, 42 N. W. 101.

It is insisted by counsel that the late case of *Uecker v. Thiedt,* 133 Wis. 148, 113 N. W. 447, is in conflict with the *Stowell Case.* We do not so understand it. In the *Uecker Case* it appears that there was no fraud which induced the rendition of the judgment, and the court so held. Moreover, it is said in the opinion that there was nothing in the case showing that the judgment attacked was inequitable or unfair. Nor is anything said in the case tending in any way to discredit the *Stowell Case* or other cases in this court. As we have seen, the *Stowell Case* is well supported by subsequent decisions of this court and is not wholly without support in other jurisdictions, as will be seen by an examination of the following cases: *Maddox v. Apperson,* 14 Lea (82 Tenn.) 596; *Peagram v. King,* 2 Hawks, 295; *Moore v. Gulley,* 144 N. C. 81, 56 S. E. 681, 10 L. R. A. N. S. 242, where it is held there must be a conviction for perjury; *Nelson v. First Nat. Bank,* 70 Fed. 526; *Galena & S. W. R. Co. v. Ennor,* 116 Ill. 55, 4 N. E. 762; *Moore v. Parker,* 25 Iowa, 355; *Glover v. Hedges,* 1 N. J. Eq. 113; *Jewett v. Dringer,* 31 N. J. Eq. 586. It is true there is much conflict in the authorities upon this subject, but we see no reason for departing from the rule heretofore laid down and followed by this court. We believe it is in harmony with the general rules of equity jurisprudence and best calculated to promote the doctrine so often enunciated by this and other courts, "that equity suffers no wrong to go without a remedy, the wrong being of sufficient gravity to be appreciated by the conscience of the chancellor, and application being made to its jurisdiction seasonably and with clean hands."

On the allegations of the complaint we think it showed a case in equity to enjoin the judgment on the ground that it

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was obtained solely upon the fraud and perjured evidence of defendant, and that plaintiff could not with due diligence have discovered the fraud or perjury in time to be available in the first action. Perhaps no court has gone farther than this in upholding the doctrine that equity allows no wrong to go without a remedy, as evidenced by the language heretofore quoted from the *Balch Case*. That language is a vigorous statement of the doctrine, founded upon sound principles and policy. We believe that no new mark need be set in the present case in holding that the allegations of the complaint are sufficient to state a case for relief in equity. If no case is made by the complaint, it would seem that the language quoted from *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132, rests in a fiction not capable of practical application. We therefore conclude that the complaint stated a cause of action, and no error was committed in overruling the objection to evidence under it.

2. It is further assigned as error that the findings are not supported by the evidence. It is established by all the authorities that a very high degree of proof in such cases is required, many cases holding that there must be a conviction for perjury before equity will interfere, while others hold that it must be established beyond reasonable doubt either by admission, documentary evidence, or by such other proof as to leave no reasonable ground for doubt. *Moore v. Gulley*, 144 N. C. 81, 56 S. E. 681, 10 L. R. A. N. S. 242; *Peagram v. King*, 2 Hawks, 605; *Woodruff v. Johnston*, 19 N. Y. Supp. 861; *Bloss v. Hull*, 27 W. Va. 503; *Moore v. Parker*, 25 Iowa, 355; *Jones v. South's Adm'r*, 3 A. K. Marsh. (10 Ky.) 352; *Clark v. Hackett*, 1 Cliff. 269, Fed. Cas. No. 2,823; *Oldham v. Cooper*, 5 Del. Ch. 152; *Ableman v. Roth*, 12 Wis. 81; *Stowell v. Eldred*, 26 Wis. 504; *Barber v. Rukeyser*, 39 Wis. 590; *Jilsun v. Stebbins*, 41 Wis. 235; *Tucker v. Whittlesey*, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101. The reason of the rule is obvious as laid down in the cases. If a litigant

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were permitted to restrain the enforcement of a judgment regularly entered after a trial in a court of law upon conflicting or uncertain evidence as to whether perjury was committed in securing the judgment, it is easy to see what interminable litigation such a rule would invite. Courts of equity, therefore, should not restrain the execution of judgments, except where the ground for interference is established beyond all reasonable controversy by evidence clear, convincing, and satisfactory. *Linde v. Gudden,* 109 Wis. 326, 85 N. W. 323. All the authorities agree that evidence of the highest dignity is necessary to justify the interference of equity in such cases. In the instant case the evidence was far from coming up to the rule which the authorities from the earliest decisions down to the present time require. In *Tovey v. Young,* Finch's Prec. in Ch. 193, the Lord Keeper said:

"New matter may in some cases be ground for relief; but it must not be what was tried before: nor when it consists in swearing only, will I ever grant a new trial, unless it appears by deed or writing, or that a witness, on whose testimony the verdict was given, were convicted of perjury, or the jury attainted."

The witness Fassage swore to alleged admissions made by *Ott* nineteen years before the trial to the effect that he had been discharged, while *Ott* positively denied that he ever made such statements or ever had been discharged. True, Powers gave evidence tending slightly to corroborate Fassage. The corroborating evidence, however, was of little force when weighed against other circumstances in the case. Fassage further testified that Pool said he would take *Ott* back at a salary of $15 per week, but that *Ott* would have to surrender the contract previously made, and *Ott* claimed it had been lost or mislaid. It would have been easy for Pool, if the agreement had been canceled as Fassage testified, to have taken some receipt or writing showing the agreement. And

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it is singular if it had been canceled that he should let it run from 1889 to the time of his death without in any way making permanent record of it. The fact that the contract was never surrendered or any evidence in writing preserved to show it was, is strong corroborating proof that it continued as *Ott* claimed. *Ott* is corroborated by the written contract and his continuance and interest in the firm, while the only evidence on the other side is the evidence of Fassage respecting alleged statements made nineteen years before the trial with slight corroboration by Powers. Moreover, does it seem reasonable that *Ott* would walk out without any settlement and take nothing when he had a binding contract which had run from October, 1887, until at least the fall of 1889, when it is claimed he was discharged? Why should he peaceably submit to cancellation of his agreement without consideration after the business had prospered and Pool was able to draw from the business $10,000, as it appears he was able to do in 1889? The assets in 1889 were $29,000, or about three times the original investment. Upon this state of the case it is plain that there is not sufficient evidence to make out a case for the plaintiff by that high degree of proof required by the authorities. In the view we take of the case it is unnecessary to consider other questions discussed. It follows that the judgment of the court below must be reversed.

By the Court.—The judgment below is reversed, and the action remanded with directions to the court below to dismiss the action.

The following opinion was filed February 26, 1909:

MARSHALL, J. I concur in the result of this case, but upon radically different grounds than those assigned for the decision.

I consider it most unfortunate to engraft a new rule of evidence upon our jurisprudence. Above all things the develop-

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ment of the law should be in the direction of simplicity and certainty rather than the contrary. At common law but two rules as to certainty to be attained by evidence were recognized,—the reasonable certainty appertaining to all civil cases, and certainty beyond a reasonable doubt, applicable to criminal cases. That easily understood and adaptable system has heretofore, and before the time of any of the present members of the court, been complicated by the rule of certainty produced by clear and satisfactory evidence, applicable to ordinary fraud cases, and certainty beyond all reasonable controversy, applied to a certain class of civil cases, or leaving no substantial doubt applied to other cases. To those we now add, as applicable to this special class of civil cases, the rule that the turning question must be established on the part of the plaintiff by the highest degree of certainty known to the law. In this confusing state of things little wonder there is that trial courts go astray. How beneficial it would be to the administration of justice, if we could return to the old landmarks: reasonable certainty under all the circumstances as to civil cases, and certainty beyond every reasonable doubt as to criminal cases.

Now I see no reason for going to other jurisdictions and borrowing this last rule for civil cases. It has no real existence, as we shall see as we progress. I must make my protest against the venture, adhering to the time-honored doctrine that fraud must be established by clear and satisfactory evidence, expressing the belief that such rule should be understood as not, appreciably, if at all, going beyond the ordinary rule of reasonable certainty. The term "clear and satisfactory" should be regarded as merely suggesting the nature of evidence required, in a fraud case, to establish the fact to a reasonable certainty.

I apprehend that, had my brethren applied to the case the ordinary rules found in the books, they would not have come to the conclusion that the learned court's findings are against

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the clear preponderance of the evidence. The trial court applied the rules this court has inculcated in fraud cases for fifty years and more. Eminent counsel upon both sides tried the case with the view that such rules were not to be departed from. Nothing of the sort now suggested, that the fraud should be established beyond a reasonable doubt, has ever been held before except in case of avoiding a solemnly executed and acknowledged instrument. I cannot bring myself to concur that, in applying the usual rule, the trial court committed error. I would not now make a new retroactive rule for the purpose of overturning a faultless determination of a question of fact.

It follows that, in my view, the judgment should be affirmed if the enforcement of the first judgment can properly be enjoined upon the ground that it was obtained by perjured testimony.

I will now endeavor to show that, notwithstanding the early decision in *Stowell v. Eldred,* 26 Wis. 504,—which I confess is direct authority for avoiding a judgment by equitable interference on the ground of its having been obtained by perjury, and there has been repeated approval since that time of the general doctrine that equity can thus relieve a party from a judgment obtained by fraud;—it went upon a plain misconception of the law, as indicated by the decisions cited to support it; that it has never been followed as to the precise situation we are dealing with; that the doctrine of it has been in recent years twice repudiated; and that such doctrine is contrary to well-nigh universal authority.

In *Barber v. Rukeyser,* 39 Wis. 590, *Stowell v. Eldred, supra,* was referred to on the general rule of equitable interference, but no perjury was claimed and the judgment was not disturbed. The same is true of *Hiles v. Mosher,* 44 Wis. 601. *Johnson v. Coleman,* 23 Wis. 452, was a case of fraud upon the court in procuring an order of publication of the summons by false representation. That belongs to an en-

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tirely different class of cases than the one in hand. *Nevil v. Clifford,* 55 Wis. 161, 12 N. W. 419; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229; and *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132, are cases where the judgment was obtained by collusion between the plaintiff and the representative of the defendant. It will be seen, at once, that they are in a class by themselves and do not go at all on the ground of mere perjury in obtaining the judgment. *Tucker v. Whittlesey,* 74 Wis. 74, 41 N. W. 535, 42 N. W. 101, belongs to a somewhat different class, one where the plaintiff sustained pretty close fiduciary relation to the person against whom the judgment was rendered and failed to disclose that which he was in duty bound to on account of such relations. In *Nye v. Sochor,* 92 Wis. 40, 65 N. W. 854, relief was sought on the ground that the defendant was prevented from being present to make his defense on account of the fraud of the plaintiff,—another well-known class of cases, contemplating physical prevention or something equivalent thereto, not mere withholding of the truth through dishonesty unmixed with duty to disclose because of trust or fiduciary relation of some sort.

The foregoing include substantially all the cases of moment decided by this court where the subject of enjoining the collection or enforcement of an inequitable judgment has been involved. All except the first contain the essential element of extrinsic fraud hereafter alluded to. Most of them refer to *Stowell v. Eldred, supra.* A number repeat what is there said, to wit:

"Chancery will relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense by fraud or accident, or the acts of the opposite party unmixed with negligence or fault on his part."

Not one, except the first, involved to any extent whatever the precise question here, and the rule itself was stated much

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broader than can be vindicated by reference to authority elsewhere and certainly by the cases cited in support of it, as will be hereafter seen. The general limitless, so to speak, statement, that equity will relieve from a judgment which is unfair merely because the defendant has a defense which he did not seasonably discover and is free from negligence in that regard, of course has no substantial support. It would include a multitude of situations where equity might lay hold to disturb adjudications, leaving no stability to judgments and defeating the public policy that a time must come as to all controversies when they will be considered at rest; remedies having gone as far in the vindication of justice as is practicable; so far that to go further for the purposes of a situation now and then arising, would, in general, do a far greater wrong than to leave the few which are within the realms of mere possibility beyond the boundary of the practicable.

That the unqualified statement contained in the *Stowell Case* was not guarded as it should have been, is suggested by the fact that it has never been since applied to relieve from the effect of mere perjury, and as to fraud has been confined to fraud upon the court or fraud upon the defeated party by preventing—within the strict meaning of the term, suggesting physical prevention or something equivalent, not mere failure of disclosure and abuse of fiduciary, or trust relations and collusion between the prevailing party and the representative, or representatives, of the adverse party—him from making his defense. The suggested limitations are vindicated by the settled law as we find it laid down in all the standard text-books and substantially all authorities.

It is laid down that the causes for equitable interference are divided into two major classes: first, fraud by the prevailing party; second, excusable negligence to present a defense, not attributable to the adverse party. 2 Freeman, Judgments (4th ed.) § 488.

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The first class does not relate to fraud respecting the merits and creating the condition in the action passed upon by the court, but fraud extrinsic to the action either practiced upon the court or upon the party. 2 Freeman, Judgments (4th ed.) § 489. That is, some act ulterior to the merits by which the party is prevented from presenting, or induced not to present, his defense. That includes fraud upon the court by presenting the case for judgment under false pretense of having complied with the law as to giving notice to the adverse party so far as the nature of the case would permit, or fraud upon the party by inducing him to absent himself or otherwise keeping him from the trial either by some false pretense or physical prevention, or keeping him away or intimidating him by threats, or taking judgment contrary to an agreement, rendering the making of a defense the adversary has, impossible, or where the attorney for the defeated party corruptly permitted judgment to be taken, and like situations. All relate, as will be seen, to purely extrinsic matters; extrinsic fraud. It would take much time to go into details. Suffice it to say, that in all cases the element of fraud is extrinsic, that it does not have to do with the merits of the case, as by merely making false proof, wilfully or otherwise.

We do not need to discuss the second major class as it does not, in any view, include such a case as the one in hand. Such class relates to mere excusable neglect on the part of the person asking relief, not chargeable at all to any wrongful conduct on the part of the person against whom relief is sought. But all such relate to matters of an extrinsic character. The subject is dealt with at length along these lines in 2 Freeman, Judgments (4th ed.) §§ 488–496, inclusive, and Black, Judgments (2d ed.) §§ 365–387, inclusive.

So the supreme test of competency for equitable relief is whether the facts constituting the fraud are extrinsic. If they are intrinsic in any sense, competency does not exist. That suggests at once that mere perjury, as in this case, does not satisfy the test.

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That was evidently overlooked in the *Stowell Case*. Consider that with the test we find laid down at sec. 489 in Freeman on Judgments (4th ed.):

"Whenever an issue exists in any action or proceeding, each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counter proofs. Where he has an opportunity to do this, and does not avail himself of it, or, though availing himself of it, is unable to overcome the effect upon the court or jury of the evidence offered by his adversary, he cannot, in effect, obtain a retrial of the issue before another tribunal by charging that the judgment against him was procured by perjury; and this has been held to continue to be the rule, notwithstanding the existence of a statute authorizing actions to set aside judgments obtained by means of perjury or subornation of perjury."

And in Black on Judgments (2d ed.) § 372:

"In some jurisdictions, it is thought that if a party to a suit intentionally procures and produces false testimony, suborning his witnesses to perjury and conspiring with them to secure a judgment, this amounts to such fraud as will enable the adverse party, if defeated in the suit, to secure an injunction against the judgment. But this doctrine is denied in other states, and indeed the general current of authority is now in favor of the rule that perjury committed by the successful party or his witnesses at the trial is no sufficient ground for vacating the judgment or enjoining its enforcement."

So firmly established in American jurisprudence is that rule, that it has been recognized as not open to invasion except by legislative authorization and even in face of a plain statute of Minnesota that:

"In all cases where judgment has been, or hereafter may be, obtained in any court of record by means of the perjury, subornation of perjury, or any fraudulent act, practice or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment at any time within three years after the discovery by him of such perjury, subornation of perjury or of the facts constituting such fraudulent act, practice or representation,

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—the court regarded the letter of the written law as going to such a dangerous length, as regards equitable interference, on the ground of mere perjury in obtaining the judgment, as not to have been intended to apply to a case where the subject matter was in issue in the action and the losing party had no right to depend upon the evidence of his adversary to disprove the latter's claim or to establish the former's defense. The reasoning of the court on this subject in *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797, affirmed in *Watkins v. Landon*, 67 Minn. 136, 69 N. W. 711, is so logical and so directly in line with the general current of American authority that I cannot do better than to quote from it at length:

"Besides the reason that the act is in derogation of the common law, there is another reason for a strict construction, furnished by the consequences to which a large construction would lead. All who are familiar with the trial of causes know how ready the defeated party is, however full an opportunity he may have had to present his case, to charge that the result was brought about by false swearing and perjury of the successful party and his witnesses. That is often the feeling of the defeated party, especially where there is a direct conflict between the testimony on one side and that on the other. Had these defendants been defeated in the first action, they might have felt and alleged that it was through perjury on the part of the defense. Should they be defeated in this action, and their former judgment be vacated by the judgment in this, they might allege that the result was reached through perjury of the opposite party; and so on, *ad infinitum*, as often as the matter should be tried and a judgment rendered. Where, if the statute allows an action to be brought to set aside any judgment upon the naked allegation of perjury, will be the end of litigation? When will controversies between litigious parties be finally determined? If the statute permits controversies to be in that manner perpetually kept open, it is certainly a very mischievous one. We cannot think the legislature intended to go that length."

Except a very few, not well-considered cases here and there, we might call the roll of the state and federal courts in support of the foregoing. My brethren confess a conflict of au-

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thority, but fail to confess the very meager and illogical character of the adjudications out of harmony with what we have seen to exist, and fail to confess that the *Stowell Case,* as to the particular subject in hand, stands alone in this court, and fail to confess that in most of the cases where it has been cited, in this and other courts, reference to which is made in the court's opinion, substantially all the references are to situations falling within the remediable class, not such as we now have.

As indicated, I have made reference to substantially all the cases in this court. I will now refer to three of the foreign citations as a type of all. *Jewett v. Dringer,* 31 N. J. Eq. 586. The sole question was whether the court of original jurisdiction could entertain a bill to review a decree entered upon a *remittitur* from the supreme court, and it was held not. The court, incidentally, said that it could entertain a bill to avoid a judgment entered therein and procured by fraud, but what the court had in mind by the term "fraud" is not suggested. Reference to other cases in that court will easily show that mere perjured testimony, given in obtaining the judgment, was not thought of. The case has not, as I view it, the remotest bearing on the situation now under treatment.

In *Moore v. Parker,* 25 Iowa, 355, the action was for relief from fraud *aliunde* the trial, facts extrinsic, within the rule we have stated. As in *Jewett v. Dringer, supra,* no such thing as false testimony in obtaining the judgment is suggested as a proper ground for relief. The same is true of *Galena & S. W. R. Co. v. Ennor,* 116 Ill. 55, 4 N. E. 762. On the subject now in hand the court said:

"It cannot be allowed as a ground for setting aside a judgment, that there was false testimony given on the trial, or false assertions as to liability, previously made. If this were admitted there would be little stability in judgments."

Wherein do such authorities support the doctrine of the *Stowell Case?* If they have any bearing thereon I am en-

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tirely unable to discover it. A multitude of authorities such as my brethren seem to think point the opinion might be added to the few cited.

We will now return to the *Stowell Case,* briefly, for the purpose of showing that the cases therein cited and upon which it was grounded do not support it, and then show that the true doctrine above indicated has been adopted, substantially universally, and then that the early rule promulgated here has been abandoned.

The first case cited in the *Stowell Case* is *Foster v. Wood,* 6 Johns. Ch. 86. It is sufficient to say as to that, relief on the ground of perjury was not sought nor mentioned; only the general principle was recognized that relief from a judgment secured by fraud may be obtained.

The next case is *Merritt v. Baldwin,* 6 Wis. 439. There the plaintiff fraudulently took advantage of the absence of the defendant to obtain his judgment.

The next is *Huebschman v. Baker,* 7 Wis. 542. The relief was granted from the result of neglect of the attorney, whom defendant had a right to rely on to protect his interest and who wholly failed to do so, allowing judgment to go by default.

The last is *Ableman v. Roth,* 12 Wis. 81. The relief was sought because the plaintiff brought the case to trial in breach of a verbal agreement for its postponement and thereby obtained the judgment. This ends the chapter, and it will be easily seen how very foreign the citations are from the doctrine grounded thereon. In every case the fraud claimed was plainly extrinsic. It did not have any bearing whatever on the subject of perjury in obtaining the judgment.

Turning to the citations of the learned counsel, who so distinguished themselves by obtaining promulgation of the troublesome doctrine, we find a very interesting situation:

Emerson v. Udall, 13 Vt. 477, was relied on and, perhaps, influenced the court. REDFIELD, Justice, merely suggested

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that in no event could the presentation of false testimony or suppression of truth give cause for relief unless it was wilful, and it was suggested that even then it was questionable whether a court of equity could give relief or not. It should be noted in this connection that the court was not dealing with the solemn adjudications of a judicial tribunal, but with an award of arbitrators. Whatever uncertainty there was at that time, as to the state of the law as regards the precise question to which the case was cited, was solved, later, in *Camp v. Ward,* 69 Vt. 286, 37 Atl. 747, where the court said, most distinctly, that perjury is not a sufficient ground for enjoining a judgment; that fraud must be collateral, and that perjury in the action is not such. The further citations did not add anything of value for the court to have acted upon.

On the other side counsel contended that "a judgment will not be enjoined in . . . equity upon the ground that a witness upon whose testimony the judgment was obtained was mistaken or wilfully swore falsely"—citing *Smith v. Lowry,* 1 Johns. Ch. 320. There the court was very pronounced on the subject as to the precise doctrine for which I contend. The gist of the decision is thus stated in the syllabus:

"An injunction will not be granted to stay proceedings at law, on a judgment, on the ground that the defendant at law was prevented, by public business, from making due preparations for, and attending at, the trial; and that plaintiff had, on the evidence of one witness, whom he had suborned to swear falsely, recovered a verdict for a much larger sum in damages than he was justly entitled to; and that the supreme court had refused to grant a new trial in the cause."

Some quite extreme English cases are referred to in the opinion, somewhat out of harmony with the court's conclusion, with the remark that "this doctrine seems to be overruled, on the broad ground that there must be an end of litigation; and it may be questioned whether equity would now interfere, even in this case, after the refusal by a court of law."

That case was decided in the formative stage of equity ju-

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risprudence in this country. Later the New York court left no manner of doubt as to its position.

In *Paterson v. Bangs,* 9 Paige, 627, the grounds of relief were limited to situations where the party was "prevented by fraud or accident without any fraud or negligence in himself or his agent." Note the word "prevented" which points to extrinsic circumstances as we have seen. In *Mayor, etc. v. Brady,* 115 N. Y. 599, 22 N. E. 237, it was said, referring to previous adjudications, that the fraud which will vitiate a judgment is fraud practiced in the procurement or concoction of the judgment itself, by which the defendant was prevented from availing himself of his defense, as distinguished from mere false proof. In the case referred to, the federal rule, which was adverted to by the Vermont court and which particular attention will be given to hereafter, was unqualifiedly adopted. In *Ross v. Wood,* 70 N. Y. 8, the situation was more aggravated than the one claimed to exist here. Yet it was held not to present a case of fraud extrinsic, or as the court put it, "in the very concoction or procuring of the judgment or decree." The gist of the decision is well stated in the syllabus, thus:

"An equitable action cannot be maintained to annul a judgment rendered upon conflicting evidence, upon the ground that the opposite party and his witnesses conspired together to obtain a judgment by perjury and fraud, and that the judgment was obtained by false evidence."

Many other New York cases might be referred to of like effect showing that the rule in that state is directly opposite to what was seemingly supposed in the *Stowell Case.*

Now we must turn for a moment to the federal rule adopted in substantially all the cases decided since it was promulgated, and by all the text-writers.

The dominant principle was first phrased by Chief Justice MARSHALL in *Marine Ins. Co. v. Hodgson,* 7 Cranch, 332. It was said, without attempt to define precise limitations, that "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not

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have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

It will be seen, at once, that the evident attempt to state these general principles in the *Stowell Case* expanded them very greatly and, in view of the authorities cited, rather inconsiderately. The precise nature of the fraud contemplated by the rule was left quite uncertain till *U. S. v. Throckmorton,* 98 U. S. 61. There for the first time, what is meant by fraud in the procurement of a judgment was elucidated so as to entirely eliminate cases of this sort and so illustrated as to show, clearly, that only matters extrinsic are subjects of relievable fraud, that no one need now go astray. It should be noted, in passing, that *Smith v. Lowry,* 1 Johns. Ch. 320, cited to the attention of this court in the *Stowell Case,* but seemingly overlooked in making up the decision, was referred to as one of the controlling authorities. Relief from the judgment was sought upon the ground that it was obtained by using a fraudulently antedated paper, material to the controversy, and depositions of perjured witnesses. Relief was denied, the court saying:

"Fraud vitiates the most solemn contracts, documents, and even judgments. There is also no question that many rights originally founded in fraud become . . . by the protection which the law throws around rights once established by formal judicial proceedings . . . no longer open to inquiry in the usual and ordinary methods. . . .

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent"—Now note the illustrations: "as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his de-

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feat; or where the attorney regularly employed corruptly sells out his client's interest to the other side," or similar situations of fraud practiced upon the party seeking relief *preventing* him from making his defense, "a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence." [*U. S. v. Throckmorton,* 98 U. S. 64–66.]

Greene v. Greene, 2 Gray, 361, opinion by SHAW, C. J., was referred to for the best discussion of the whole subject extant. The case involved the right to relief from a judgment obtained by perjury. Relief was denied, the learned justice saying:

"The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the matter has been actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted."

The federal supreme court concluded its exhaustive discussion by formulation of this rule, now thirty years old, and familiar to all courts as a classic:

"The acts for which a court of equity will set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

The importance of adhering closely to the rule was thus pictured:

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, . . . would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

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If we were to take time to indicate with appropriate citations the multitude of cases in the courts of this country where that rule and logic has been adopted, the language of the federal court being quoted, and it being expressly pointed out that perjury in the case is matter intrinsic, not collateral, and so not within the rule as to relievability, this opinion would be extended to a very great length. Pages would be occupied with mere titles of cases and where they may be found. The following are a few of the most striking of such cases, directly on the point: *Maryland S. Co. v. Marney,* 91 Md. 360, 46 Atl. 1077, where not only perjury but subornation of perjury was held not to be a ground for relief. To the same effect are *Gray v. Barton,* 62 Mich. 197, 28 N. W. 813; *Pico v. Cohn,* 91 Cal. 129, 25 Pac. 970, 27 Pac. 537; *Woodruff v. Johnston,* 19 N. Y. Supp. 861; *Demerit v. Lyford,* 27 N. H. 541; *Kretschmar v. Ruprecht,* 230 Ill. 492, 82 N. E. 836; *Graves v. Graves,* 132 Iowa, 199, 109 N. W. 707; *Hilton v. Guyot,* 159 U. S. 113, 16 Sup. Ct. 139; *Mahoney v. State Ins. Co.* 133 Iowa, 570, 110 N. W. 1041; *Richards v. Moran,* 137 Iowa, 220, 114 N. W. 1035; *Hass v. Billings,* 42 Minn. 63, 43 N. W. 797; *Hamilton v. McLean,* 139 Mo. 678, 41 S. W. 224; *U. S. v. Flint,* 4 Sawy. 42, 25 Fed. Cas. No. 15,121; *U. S. v. Gleeson,* 90 Fed. 778; *U. S. v. White,* 9 Sawy. 125, 17 Fed. 561; *Cotzhausen v. Kerting,* 29 Fed. 821; *Ritchie v. McMullen,* 79 Fed. 522; *Fealey v. Fealey,* 104 Cal. 354, 38 Pac. 49; *Hanley v. Hanley,* 114 Cal. 690, 46 Pac. 736; *Pepin v. Lautman,* 28 Ind. App. 74, 62 N. E. 60; *Steen v. March,* 132 Cal. 616, 64 Pac. 994; *Gusman v. Hearsey,* 28 La. Ann. 709; *Verplanck v. Van Buren,* 11 Hun, 328; *Wabash R. Co. v. Mirrielees,* 182 Mo. 126, 81 S. W. 437; *Neun v. Blackstone B. & L. Asso.* 149 Mo. 74, 50 S. W. 436; *Friese v. Hummel,* 26 Oreg. 145, 37 Pac. 458; *Codde v. Mahiat,* 109 Mich. 186, 66 N. W. 1093; *Ames v. Snider,* 55 Ill. 498; *Adams v. Secor,* 6 Kan. 542. Later Kansas cases depend on statutory change of the rule.

The treatment by my brethren of *Pico v. Cohn, supra,* and

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similar cases, as if such cases recognize fraud of the nature here involved to be sufficient to warrant such an action as this, because they hold "that in some cases a former judgment may be annulled for fraud," and the statement by my brethren that just what is included in the term "extrinsic fraud" is not easily determinable, as if the uncertainty gives range to include perjured testimony in the action,—seems very weak support since in the California case referred to, and many that followed it, and the very cases suggesting the uncertainty referred to, all agree that "fraud extrinsic" does not include perjury in the action, but unquestionably excludes it.

Now a word on the suggestion by my brethren that *Marshall v. Holmes,* 141 U. S. 589, 12 Sup. Ct. 62, where relief was held proper upon the ground that the judgment sought to be set aside was procured by means of plaintiff therein leading the court to believe that he contracted with the defendant through one Boyd, and that he was duly authorized in that regard in writing,—by producing a letter purporting to have been written by the plaintiff to that effect, which was a forgery, modified the *Throckmorton* rule. The *Throckmorton Case* was only incidentally referred to, with nothing to indicate, expressly, modification of it in any way. However, the case bears all earmarks of having been decided without full appreciation of the situation the court had created. It was probably supposed that the forgery of the instrument, and use of it to obtain the contract, ostensibly on the credit of the plaintiff, not the use of it upon the trial, was the real ground of the mischief and so was fraud extrinsic. It cannot be thought for a moment that any infraction of the rule—which had existed without question for some thirteen years and become the law of the land in all federal and all state courts—was intended. That is rendered unmistakable from the fact that in many cases decided since 1891, when the adjudication in question occurred, the *Throckmorton* rule is found vindicated in all its integrity, particularly as to the very point in controversy in this case. *U. S. v. Gleeson,* 90 Fed. 778; *Hil-*

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ton v. Guyot, 159 U. S. 113, 207, 16 Sup. Ct. 139; *Pittsburgh, C., C. & St. L. R. Co. v. Keokuk & H. B. Co.* 107 Fed. 781.

True, after the *Marshall Case* a controversy arose as to whether the *Throckmorton* rule, in some of its aspects, had not been modified by the later case, creating an irreconcilable conflict. The supreme court was appealed to in *Graver v. Faurot,* 76 Fed. 257, to settle the matter, but did not reach the supposed difficulty. In *Bailey v. Sundberg,* 145 U. S. 628, 12 Sup. Ct. 239, and again in the same case, 154 U. S. 494, 14 Sup. Ct. 1142, an appeal was made to the supreme court for a writ of *certiorari* to review the judgment upon the ground that the lower court committed a serious error of law in adhering to the *Throckmorton* rule instead of the supposed infraction of it. Both applications were denied. It was expressly affirmed in *Hilton v. Guyot, supra,* in 1894. It was said in *U. S. v. Gleeson, supra,* not to have been displaced at all by *Marshall v. Holmes, supra,* and for more than ten years it has been regarded as the unquestionable rule for the federal and state courts. In view of this history, I submit that the decision here cannot be justified upon the ground that the doctrine of the *Throckmorton Case* has been at all disturbed by the court which declared it.

We now turn to our own decisions and show that the rule so firmly established elsewhere has been unqualifiedly adopted here, in place of the rule in *Stowell v. Eldred,* 26 Wis. 504.

In *Uecker v. Thiedt,* 133 Wis. 148, 113 N. W. 447, decided so recently as to be fresh in memory of us all, the court, speaking by Mr. Justice DODGE, said:

"Fraud which can be made the basis of an attack upon a solemn judgment of a court of record must have directly induced the rendition of the judgment, not merely have induced or brought about a condition upon the real existence of which the court acted as a basis of its decree,"

citing *U. S. v. Throckmorton, supra,* and other cases to which I have referred. What was left out to make an unmistakable

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repudiation of the *Stowell Case* except the addition, almost necessarily to be inferred, *Stowell v. Eldred,* 26 Wis. 504, overruled. The two cannot stand together. How can one say there is nothing said in the later case in any way to discredit the early one merely because the facts of the two were different, since in both the court intended to state a rule of general application? I leave the reader of our opinions to answer this, each for himself. True, there was no fraud in the *Uecker Case,* as it turned out. True, the court said: "There was nothing in the case showing that the judgment attacked was inequitable or unfair." But both fraud and inequity were claimed and it *was to the claim* the court addressed the rule the same as in the *Stowell Case.* The fact that in the one it stood the test and in the other it did not, since the measuring tests radically differ, does not make the cases harmonize by the logic I must apply.

Later in *Scheer v. Ulrich,* 133 Wis. 311, 113 N. W. 661, to which my brethren do not refer, the *Throckmorton* rule was again cited with added definiteness, reaffirming the previous approval thereof. That would seem to firmly entrench it in our jurisprudence. I will not say more excepting to assert that one or the other of the rules must give way and that the inconsiderate promulgation in the *Stowell Case* must be that one if we are to be both in harmony with ourselves and with the great weight of authority elsewhere.

In passing I should make this further brief reference to cases in my brethren's opinion supposed to support the decision. In *Nelson v. First Nat. Bank,* 70 Fed. 526, relief on the ground of perjury was denied, but such relief was held competent under some circumstances. It was a Minnesota case, obviously governed by the Minnesota statute providing for such relief, which statute has been so restricted, as we have seen, as not to materially avoid the *Throckmorton* rule.

Moore v. Parker, 25 Iowa, 355, we have referred to. If it supports the decision here, and I think it does not at all, there

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is a statute on the subject of relief on the ground of fraud, and, moreover, the subject was set at rest in *Graves v. Graves,* 132 Iowa, 199, 109 N. W. 707, where all previous adjudications were reviewed and the court definitely adopted the *Throckmorton* rule, saying that perjury in obtaining a judgment is not a sufficient ground for an action of this sort.

Galena & S. W. R. Co. v. Ennor, 116 Ill. 55, 4 N. E. 762, as we have seen, is directly opposed instead of in favor of the position now adopted.

In *Maddox v. Apperson,* 14 Lea (82 Tenn.) 596, the case did not go on the question here at issue. The *Throckmorton* rule in its general aspects was approved, but it was said that if the term "extrinsic fraud," as distinguished from "intrinsic," would bar relief where a judgment is obtained by suppressing evidence which the prevailing party by his relation to the adverse party is bound to disclose, fiduciary relations of some sort being suggested, the court would not go that far.

Moore v. Gulley, 144 N. C. 81, 56 S. E. 681, was governed by a very ancient rule in North Carolina that equity would relieve from a judgment obtained by perjured testimony, conditioned upon the perjury being first established by a due prosecution and conviction. The North Carolina doctrine is recognized in the books as peculiar to that state. *Woodruff v. Johnston,* 19 N. Y. Supp. 861, cited to the point that relief such as is now sought is proper, the perjury being conclusively proved as by a precedent conviction, directly holds, as we have seen, that such an action cannot be maintained at all. The incidental observation, which attracted my brethren's attention, that there must be a conviction before a new trial can be granted on the ground of perjury, had reference to *Holtz v. Schmidt,* 44 N. Y. Super. Ct. 327, where there was a motion in the action for a new trial, not an equitable action to avoid the judgment. As to the latter, as we have seen, it is said perjury is not a ground of action at all.

Bloss v. Hull, 27 W. Va. 503, as I understand it, is of the

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same nature. Other cases cited concluding the list are either under special statutes or do not refer to such a situation as we have here, or have been displaced by later decisions.

I will not pursue the matter further. If there is any substantial support for the adherence to the early decision in *Stowell v. Eldred, supra,* I am unable to find it.

Thus, it seems the court after twice, just recently, having adopted the *Throckmorton* rule, has put aside the opportunity to say, directly, what is so plainly said inferentially, that the early case is overruled. No other case stands at all in the way of bringing this court into full harmony with the judicial world.

I personally reassert the rule with as much force as, standing alone, I can, so well stated by Mr. Justice DODGE for the court in *Uecker v. Thiedt, supra:* Fraud to be the basis of attack upon a solemn judgment of a court must be extrinsic and have directly induced the judgment. Mere perjured testimony creating a fictitious condition upon which the court acted as a real one, resulting in the judgment, is not sufficient.

That rule might, now and then, render a wrong remediless, but, as the learned federal court and many of the state courts have said, the contrary rule is fraught with great mischiefs, for it would render strife by means of judicial instrumentalities endless. Hardly a hotly contested action is tried but that the defeated party honestly believes his defeat is attributable to perjured testimony on the other side. In that situation and with such a rule as I contend against it would be possible for contest to follow contest, as the Minnesota court aptly said, *"ad infinitum,* as often as the matter should be tried and a judgment rendered."

The foregoing no more infracts the rule, "There is no wrong without a remedy," than, as said by Mr. Justice SHAW, it does the one that "fraud vitiates everything." As in the latter the presumed infallibility of judgments, after ordinary litigation has run its course, displaces the maxim, by

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estopping the party from setting up the fraud, closing the mouth on one side and the ear on the other, so it makes right, in contemplation of law, what independently of it, from a mere ethical standpoint, is wrong. As has been said, "There is no wrong without a remedy," but there is no wrong, in legal contemplation, as to that upon which the law's instrumentalities have set their seal, in the ultimate, of right. *Judicia sunt tanquam juris dicta, et pro veritate accipiuntur.*

The findings of the trial court should be approved, but the judgment reversed because the proved perjury under the circumstances is not relievable in the manner sought.

Upon a motion by the respondent for a rehearing or that the mandate be modified so as to direct a trial by jury of the question of the rescission and cancellation of the contract of October, 1887, there was a brief for the appellant by *Sanborn, Lamoreux & Pray* and *H. B. Walmsley,* attorneys, and *Burr W. Jones,* of counsel, and a brief for the respondent by *Richard Sleight,* attorney, *James G. Flanders,* of counsel, and *Geo. F. Merrill,* guardian *ad litem* for the infant heirs.

The motion was denied March 9, 1909.

ALLEN and others, Respondents, vs. FRAWLEY, Executrix, imp., Appellant.

December 15, 1908—March 9, 1909.

Action: Survival: Revival after death of party: Equity: Discretion: Necessity: Limitation of actions: Laches.

1. A cause of action at law for deceit and fraud resulting in damages by depletion of the estate of a bank in the hands of a receiver does not survive the death of the defendant.
2. An application to a court of equity to revive and continue an action abated by death of a party is an appeal to judicial discretion, and should seldom be granted where unnecessary to

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the applicant, or when the burden cast upon the other party thereby will grievously preponderate over the benefits to the applicant, or where delay and laches have intervened so as to place the other party at serious disadvantage, and usually not where such delays have permitted a statute of limitations to run against the original demand.

3. It was an abuse of judicial discretion in this case to revive in 1904, against the executrix of a defendant who died in 1902, an equitable action in which said defendant was charged with complicity in a fraud committed in 1897,—it appearing that without such revival complete justice could be done by compelling the return to a receiver of all the property which said defendant aided in wrongfully diverting from the estate of a bank (plaintiffs' debtor); that if any money judgment against said defendant was essential it might have been obtained without resort to the court of equity; that the time limited for instituting a suit upon that cause of action had run; that serious inconvenience and burden to the estate of said defendant would result; and that the plaintiffs had been guilty of laches.

SIEBECKER, J., dissents.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

This action was originally commenced by Edward Boyle as plaintiff against the Commercial Bank of Eau Claire for the sequestration of its property for the benefit of its creditors. A receiver was appointed and administered its affairs, and upon December 30, 1897, was discharged as such and his transactions and accounts finally approved by the court. Thereafter, within the term, on petition of certain creditors, that order was vacated and set aside and the cause reorganized with F. C. Allen, a creditor, as plaintiff, and broadened to include recovery of the additional statutory liability of stockholders and recovery against the receiver and divers persons alleged to have been in collusion with him or to have defrauded him into devastation of the estate, among whom was T. F. Frawley, alleged to have been his attorney and counsel and to have used such position of trust and confidence to induce the receiver to sell to a corporation controlled by Frawley, at an inadequate price, certain tax titles and tax-title

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liens upon scattering vacant lots in the suburbs of certain towns and villages in Kansas and Nebraska, and to recover from said Frawley the value of the property so parted with by the receiver. All of these things are alleged to have been done in 1897.

An issue was joined by T. F. Frawley in August, 1898, denying all allegations against him. The action was not brought to trial as against Frawley prior to his death, which occurred June 30, 1902. August, 1902, a supplemental complaint seeking to revive the action against his executrix, *Lydia A. Frawley,* was filed, but nothing was done by the court until September 19, 1904, when an order of revival and continuance against the executrix was entered. The cause of action against Frawley was brought to trial in January, 1905, completed and findings filed July 22, 1905, a motion made by the defendant to correct the findings, and on January 9, 1907, the court filed an additional finding, and April 26, 1907, rendered judgment, *inter alia,* in favor of the plaintiffs for recovery to the receiver from the executrix of T. F. Frawley of the sum of $6,913.83 and costs, from which part of the judgment the executrix, *Lydia A. Frawley,* brings this appeal.

For the appellant there were briefs by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.*

L. A. Doolittle, for the respondents.

The following opinion was filed January 5, 1909:

DODGE, J. The first error assigned and argued is upon the order of the court made September 19, 1904, reviving and continuing the action against *Lydia A. Frawley* as executrix of T. F. Frawley, who died June 30, 1902. This is assailed, first, on the ground that the cause of action did not survive: and, secondly, that even if it did, it was an abuse of discretion to revive and continue the action. The complaint is very ambiguous, and it is by no means easy to reach a conclu-

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sion whether the pleader stated or attempted to state anything more than a cause of action at law against T. F. Frawley for deceit and fraud resulting in damages by depletion of the estate in the hands of Buffington as receiver. If so limited, of course the action would not survive. *John V. Farwell Co. v. Wolf,* 96 Wis. 10, 70 N. W. 289, 71 N. W. 109; *Lane v. Frawley,* 102 Wis. 373, 78 N. W. 593; *Killen v. Barnes,* 106 Wis. 546, 82 N. W. 536; *Lindemann v. Rusk,* 125 Wis. 210, 104 N. W. 119. In view, however, of the conclusion we have reached upon the second ground of attack we shall deem it unnecessary to decide whether the complaint, upon liberal construction, may not be deemed to attempt to charge T. F. Frawley with at least complicity in the control of some property alleged to have been wrongfully diverted from the trust property in the hands of the receiver, but shall proceed upon the assumption, hypothetically, that it does.

An application to a court of equity to revive and continue an action when interrupted or abated by the death of a party is an appeal to the wise judicial discretion of the court. *Cavanaugh v. Scott,* 84 Wis. 93, 54 N. W. 328; *Carberry v. German Ins. Co.* 86 Wis. 323, 56 N. W. 920; *Fleming v. Ellison,* 124 Wis. 36, 102 N. W. 398; *Jones v. Jones,* 68 App. Div. 5, 74 N. Y. Supp. 297; affirmed, *S. C.* 171 N. Y. 653, 63 N. E. 1118. It should seldom be granted where unnecessary to the applicant (*Robinson v. Bank of Pikeville,* 108 Ky. 389, 56 S. W. 660); nor when the the burden cast upon the other party thereby will grievously preponderate over the benefits to the applicant (*Lyon v. Park,* 111 N. Y. 350, 18 N. E. 863; *Cavanaugh v. Scott, supra*); nor where delay and laches have intervened so as to place the defendant at serious disadvantage, and usually not where such delays have permitted a statute of limitations to run against the original demand (*Beach v. Reynolds,* 64 Barb. 506; *Jones v. Jones, supra; St. Paul, M. & M. R. Co. v. Eckel,* 82 Minn. 278, 84 N. W. 1008; *Ex parte Kirtland,* 49 Ala. 403)

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The cause of action set forth was predicated upon personal conduct of T. F. Frawley occurring in 1897. It also involved fraudulent intent, which rested in large measure on Frawley's asserted knowledge of facts in regard to character and value of the Kansas and Nebraska tax claims, most of which he acquired by personal inspection, investigation, and conference with people in those localities, and of which thereafter only he himself had full knowledge, and as to which the evidence must have grown more and more difficult of discovery, and less and less certain in character, as time elapsed, and especially must the ability of his widow to find defensive evidence, after his death, have been impaired by such delay. Upon the allegations of the complaint before the court all of the property for which Frawley's estate is now held accountable was owned by a corporation situated at Eau Claire, a party to the suit, excluded from any defense as an innocent holder, and from which, therefore, the very property belonging to the estate could be reclaimed and reinstated in the hands of the receiver. Of course the court might at any time have placed such embargo upon any disposal or other change of condition of that property as was necessary to protect the rights of the parties. Nothing was apparent to indicate any insolvency or other difficulty in recovering from the corporation the proceeds or value of any of the property of which it might dispose. The complaint negatived the possession of any such property or its proceeds by Frawley, and if he were in any way liable to a money judgment as a result of his complicity, his estate was being administered in the county of Eau Claire, so that a claim in the ordinary course of administration could easily have been presented. At the time of T. F. Frawley's death in June, 1902, the plaintiffs had allowed five years to elapse after the acts on which his liability was predicated, and, while they made a formal motion within a few months after his death for the revival, that motion was allowed to drop out of consideration and to remain undisposed

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of until by reason of a decision of this court (*Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909) it was made apparent that if a cause of action existed against Frawley for an accounting it might be enforced in the present action. In all practical aspects the situation was the same as if a new motion to revive had been made in September, 1904. The result was that at the time the court acted upon the question of revival the cause of action for fraud, whether equitable or legal, had been postponed some seven years from its inception. It was one subject to the six-years statute of limitations. *Boyd v. Mut. F. Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171; *Buttles v. De Baun,* 116 Wis. 323, 93 N. W. 5. At that time it was apparent to the court that the presence of Frawley's estate or executor as a party defendant was entirely unnecessary to the doing of complete equity and justice by returning to the hands and control of the receiver all the property which it is now found that Frawley participated in diverting from the estate; that if any money judgment against Frawley was essential to such relief it might have been sought and obtained by ordinary legal processes without resort to the peculiar jurisdiction of equity. It was apparent, too, that the full time prescribed by statutes of limitation for instituting a suit upon that cause of action had run. There was also apparent the very serious inconvenience and burden to an estate from keeping alive the uncertainty resulting from such a claim pending the litigation over the very numerous matters involved in this complicated closing-up suit, and through and at the bottom of all this was obvious extreme dilatoriness on the part of the plaintiffs, whereby the situation had arisen which was in large part unexplained and unexcused, although certain portions of the delay were attempted to be accounted for by more or less legitimate considerations.

We cannot escape the conviction that in the presence of such laches it was an abuse of judicial discretion to revive the present action against the estate of T. F. Frawley, so seri-

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ously to the burden of his representatives and with such peril of injustice to them, without any corresponding necessity to the plaintiffs or threatened loss of any of their rights which they might not have fully preserved by exercise of reasonable diligence. Error was thus committed but for which the portion of the judgment appealed from, or any judgment against the appellant, could not have been rendered. We therefore do not pass upon the question whether the evidence suffices to establish the fraud alleged.

By the Court.—The portion of the judgment appealed from is reversed, and cause remanded with directions to dismiss the action as against appellant.

The following opinion was filed February 9, 1909:

SIEBECKER, J. (*dissenting*). I am unable to concur in the decision of the court. In my opinion, when liberally construed in favor of the plaintiffs, the complaint states a good cause of action for an accounting against the receiver and his alleged associates because they had wrongfully appropriated the trust fund to their own use. Under the allegations, which in my opinion are supported by the proof, Frawley was the attorney for the receiver at the time he inspected the Kansas property and made report thereon, and acted for the receiver in preparing the report to the court for the purpose of converting this property into money for the benefit of the bank's creditors. I am also persuaded that the findings of the court are not against the preponderance of the evidence and should stand as the ultimate facts in the case, and that the court awarded the proper judgment upon the facts found.

This judgment is reversed upon this appeal upon the ground that the order reviving the action against the executrix of Frawley's estate was an abuse of judicial discretion. As stated in the opinion, such "an application to a court of equity to revive and continue an action when interrupted or

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abated by the death of a party is an appeal to the wise judicial discretion of the court." The facts as found by the trial court, which I deem justified by the evidence, show that the action was an appropriate and necessary one to secure the relief demanded for the benefit of the creditors and that the court properly retained jurisdiction of the cause instead of compelling the plaintiffs to seek relief by filing claims in the county court. In the light of the facts found, the dismissal of the action as to the Enterprise Land, Loan & Investment Company cannot affect the liability of Frawley's estate for his complicity in the wrongful depletion of the trust fund. Under such circumstances each party to the transaction is liable and may be compelled to account in an equitable action for property so appropriated.

The original action was commenced in January, 1897, and reorganized into the present form in March, 1898. The parties were numerous, and the demurrers and answers of many of the defendants were not served in time to dispose of the issues at the September, 1899, term of the court. This postponed the case until the March, 1900, term of the court. It was then noticed for trial and was put over on defendants' application. It was again continued over the September, 1900, term, when it was insisted that Frawley was unable to proceed on account of illness. It appears that he continued ill until his death in 1902. There is nothing in the record to show that up to the time of Frawley's death the respondents relaxed their efforts to bring the case to trial. In September, 1902, the motion to revive the action was made and submitted. The court withheld its decision until September, 1904. It is contended that this long delay clearly indicates that the application to revive had been practically abandoned and would not have been pressed but for this court's decision in *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909, which it is claimed so modified the decision in *Boyd v. Mut. F. Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, which

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negatived the right to revive the action, as to permit plaintiffs, under the facts alleged in the complaint, to prosecute this action at that late day. In January, 1905, the action was brought to trial and submitted to the court. The court filed its findings July 22, 1905. Thereafter defendants' application for a modification of such findings was made and argued. This matter was submitted June 29, 1906, and was decided on January 9, 1907, by the filing of amendments to the original findings. Judgment was entered in April, 1907. True, the trial was much delayed, but I find nothing in the record justifying the claim that such delay was attributable to the neglect of respondents. In so far as this history is made of record it indicates that the plaintiffs were ready and willing to try the case after issue joined, but were prevented by circumstances beyond their control. It seems that the record is barren of any facts showing an effort by the defendants to proceed to the trial of the cause, and it appears affirmatively that they secured postponement of the trial when the plaintiffs were pressing to proceed. True, the court, by holding litigated questions under advisement after their submission, delayed a speedy termination, but the court's action, which protracted the litigation, cannot reasonably be made the ground of laches against plaintiffs. It seems to me that plaintiffs have shown due diligence in the prosecution of this action and that they were not responsible for the delays of the trial. Under these circumstances, in my judgment, no procrastination in the prosecution of the case is shown warranting the court's conclusion that it was an abuse of judicial discretion to revive the action against the estate of T. F. Frawley. In my opinion the judgment of the lower court should have been affirmed.

A motion for a rehearing was denied March 9, 1909.

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RIPLEY, Respondent, vs. SAGE LAND & IMPROVEMENT COMPANY, Appellant.

December 15, 1908—March 9, 1909.

Account stated: Acquiescence: Conclusiveness.

Defendant, being indebted to plaintiff for one half of the net profits of the purchase and sale of lands after deducting expenses and "annual interest of seven per cent." on moneys advanced in the transaction, sent to plaintiff a statement of account showing his share of the profits to be a certain sum, and inclosed a check therefor. In such statement interest was compounded annually. Plaintiff acknowledged receipt of the statement without making any objection thereto, and retained and used the money. Within a short time he was informed of the fact as to the computation of interest, but not until two years and nine months after receiving the statement did he give defendant any notice that he claimed an overcharge of interest. *Held*, that he had assented to the settlement and accepted the money tendered as payment of the whole amount due him, and that, no fraud or mistake being claimed, the account so settled became conclusive on the parties. BARNES, DODGE, and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

The appeal is from a judgment for $1,420.25 in favor of plaintiff. Under date of September 17, 1888, H. W. Sage & Co. wrote the plaintiff as follows:

"Yours 12th received. We will take and pay for such portions of 6,500 acres you describe as you may select after examination on the basis proposed by you, *i. e.* you to examine and locate; attend to paying taxes, if required; and protect from trespass; we to pay for the land (to be located in the name of H. W. S.), and furnish money for taxes till we sell the lands, and when sold to give you one half the net profits, over and above cost, taxes, necessary expenses of handling, and annual interest at seven per cent. We presume you will be back at Eau Claire with minutes of the lands when you receive this letter, and you can either wire us the amount of

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cash you will need, and we will send you bk. drafts for it, or if equally convenient, you may draw on us at sight, and this shall be your authority to draw on us enough to pay for the land up to 6,500 acres at ten shillings per acre."

This proposition was accepted by the plaintiff, who thereupon proceeded to examine lands then owned by the United States and make cash entries of such lands as he considered it desirable to purchase. Some 2,840 acres of land were entered, but a portion of the entries were canceled by the government. Practically all of the lands were entered in October, 1888. Thereafter moneys were received from various sources by the defendant or its predecessor, during the year 1893 the business and property of H. W. Sage & Co. having been merged in a corporation known as the *Sage Land & Improvement Company.* The amounts of money so received did not, at any time down to May 1, 1902, equal the accrued interest on moneys advanced by the defendant and its predecessor under the contract. At that time a sale of 1,720 acres was made to the J. L. Gates Land Company for $5,020. On June 5, 1902, a sale of the remaining 520 acres was made for $1,980 net. The entries as to 520 acres were canceled.

On November 12, 1902, after all the lands had been sold, the defendant forwarded from Albany, New York, to the plaintiff, a statement showing the condition of their account with plaintiff as claimed by it. Such statement showed that the plaintiff's share of the net profits at this date amounted to $114.97. A check for this amount was inclosed, and the statement showed that this check covered the balance due. The only matter between the parties then unsettled related to a claim for a refund from the government amounting to $650 for canceled entries. The plaintiff acknowledged receipt of the statement without making any objection thereto and retained and used the accompanying $114.97. In the statement forwarded by the defendant to the plaintiff interest was compounded annually. Plaintiff made no objection

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to the defendant's method of computing the interest until August 8, 1905, when its attention was called to the alleged mistake in the matter of computation and a request was made that the error be corrected. The plaintiff testified, in substance, that he did not examine the statement until some little time after it was received, and that when he did examine it he discovered that interest had been compounded; that he consulted an attorney, De Alton S. Thomas, concerning the right of the defendant to compound interest under this contract, and that his attorney advised him that it would be necessary for him to see the letters constituting the contract before advising upon the subject. Some time elapsed before plaintiff was able to find the letter of September 17, 1888. When he did find it he placed it in the hands of his attorney and advised him to take steps to notify the defendant of his claim with reference to the interest and to adjust the same. He did not learn until some time in 1905 that his attorney had neglected to take any proceedings with reference to the matter.

The circuit held that the plaintiff was not concluded by the account rendered, by his acceptance of the $114.97, and his silence with reference to the matter. The account was restated by the court, simple interest only being allowed to the defendant, and judgment was awarded in plaintiff's favor. This is an appeal from such judgment.

For the appellant there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.*

For the respondent there was a brief by *Bundy & Wilcox,* and oral argument by *R. P. Wilcox.*

The following opinion was filed January 5, 1909:

SIEBECKER, J. The defendant contends that the court erred in opening the account and awarding plaintiff a recovery for a balance on a restatement of it, because the undisputed facts show that the parties settled the account between

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them and that the plaintiff accepted payment from defendant of the amount then found due him. It is urged that it is without dispute that the defendant on November 12, 1902, forwarded to plaintiff a statement of the account of the business affairs between them arising out of the land deals, and accompanied it with the sum of $114.97 as payment of the balance due plaintiff. Plaintiff acknowledged receipt of the statement and money, retained the money, and made no objection to the correctness of the account thus rendered. There is no controversy between the parties respecting the transaction up to this point. Without explanation and modification of this situation the acceptance of the amount sent by defendant as payment of the balance due plaintiff made the account a stated one and operated as a settlement and payment of the claim embraced in the account. The plaintiff, however, alleges that there was no such settlement and payment of his claim because the defendant erroneously charged an excessive amount for interest on the sums advanced by it in payment of the lands purchased and thereby erroneously reduced the amount due him as his share of the net profits on the purchase and sale of the lands. He admits that within a short time after receipt of the account and money as payment of the balance due him on the account he was informed of this state of the account so rendered by the defendant. It appears that not until August, 1905, a period of two years and nine months, did he give defendant any notice of this alleged overcharge in the account rendered by defendant, or make any claim for any sum as due him above the $114.97 so accepted by him. He testifies that he examined the account critically shortly after he received it and the money and after he had acknowledged receipt thereof, that he did not offer to return the money nor did he then inform the defendant that he repudiated the account as incorrect, but that after such examination he took legal advice regarding the right of the defendant under the contract to compute the interest as

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it did, and some time thereafter was informed that the defendant had illegally compounded the interest, and that he thereupon instructed his counsel to take the necessary steps to have the account corrected and to demand payment of the amount still due him. No steps were, however, taken by him or his counsel for a period of nearly three years. The duty to take the necessary steps to enforce collection of any additional sum due him rested on him, and he cannot be relieved by placing it in the control of De Alton S. Thomas, his attorney. He must be held to have sanctioned inaction by his attorney, for under the circumstances the attorney's delinquency cannot explain or justify plaintiff's silence for so long a time. Under this state of the facts the question is whether plaintiff's conduct in the matter amounts to a settlement and acceptance of the account and precludes him from opening it at this late day.

It is urged by plaintiff that he in fact never assented to a settlement and payment of the account, and hence his conduct in the matter does not warrant the conclusion that the account became stated and paid. This contention omits consideration of the account as rendered, his acceptance of the amount tendered as payment of the whole amount due him, his long silence respecting the matter, and his failure to bring it to defendant's notice. Under the circumstances such acquiescence furnishes a good basis for the inference that he assented to the settlement defendant proposed by the account rendered. Such assent is as irrevocable as if he had expressly given it. Plaintiff was in duty bound to give defendant notice of his disapproval of the account within a reasonable time. It devolved on him to exercise reasonable diligence, to give proper attention to the transaction, and repudiate the account if he desired to avoid the effect of the settlement and payment of the account proposed by defendant. He did not act with reasonable diligence and vigilance to repudiate it, and his conduct permits of but one reasonable inference, namely, that he

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assented to the settlement and accepted the money tendered by defendant as payment of the balance due him. The effect of plaintiff's conduct is declared by the court in the case of *Rose v. Bradley,* 91 Wis. 619, 65 N. W. 509, where the force of the silence of a party after having received a statement of the account against him from another was considered. It is there said:

"If such other keeps the account and fails to object within a reasonable time, the facts raise a presumption or inference of acquiescence. That is all. Such presumption or inference is more or less strong according to circumstances. The neglect to return or object may be for such a length of time as to render such presumption conclusive on the question of acquiescence, so as to make an account stated."

The following cases are illustrative of this principle, which we find controls this case against plaintiff's contention: *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Voss v. N. W. Nat. L. Ins. Co.* 137 Wis. 492, 118 N. W. 212.

Since, then, the account was settled and paid, no ground is shown for opening it and allowing plaintiff to charge defendant any additional sum as due him. No fraud or mistake is claimed. Under the circumstances principle and public policy demand that when the account was settled and adjusted it became conclusive on the parties. *Martin v. Beckwith,* 4 Wis. 219; *Klauber v. Wright,* 52 Wis. 303, 8 N. W. 893; *Continental Nat. Bank v. McGeoch,* 92 Wis. 286, 66 N. W. 606.

We are led to the conclusion that the court erroneously opened a stated account, and that the complaint should have been dismissed.

By the Court.—Judgment reversed, and the cause remanded with directions to award judgment dismissing the complaint.

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BARNES, J. (*dissenting*). The contract between the parties was plain and unambiguous. Under it the defendant had no right whatever to compound interest. Its counsel does not claim or argue that it had such right. The defendant suffered no loss, wrong, or injury by reason of the failure of the plaintiff to object to the statement of the account as rendered. It does not claim any injury by reason of such failure. There was no controversy between the parties, before or at the time of the remittance, as to what amount was due. It was a mere matter of mathematical calculation, under a plain contract, to ascertain it. By reason of its erroneous and unlawful computation of interest the defendant retained moneys that belonged to the plaintiff, and which, in the exercise of good faith and common honesty, it was bound to pay him.

Plaintiff and defendant and its predecessor had a large number of business transactions amounting to large sums of money and covering a period of over twenty years. They appeared to trust each other mutually. Statements were rendered from time to time, and whenever anything was found incorrect in them it was rectified regardless of when the error was discovered. The plaintiff handed the statement here involved to his attorney shortly after it was received, to secure his opinion on the correctness of the computation of interest and to collect the balance due him if any. In view of the course the parties pursued in their dealings it is particularly harsh and inequitable to foreclose the plaintiff from asserting his rights. The check sent plaintiff did not in itself purport to be in full of account. If it did so purport it would make no difference. A receipt in full, when it is not in fact a payment in full, can always be contradicted. This is elementary law. *Prairie Grove C. Mfg. Co. v. Luder,* 115 Wis. 20, 27, 89 N. W. 138, 90 N. W. 1085; *Weidner v. Standard L. & A. Ins. Co.* 130 Wis. 10, 15, 110 N. W. 246. The defendant had a right to accept the check and to treat it as payment on account. The amount of money represented by it, and more,

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was due him. This $114.97, with another small payment made on account of moneys refunded on canceled entries, represented the earnings of a large amount of labor expended by plaintiff during a period of fourteen years. The payment was delayed for several months after it should have been made.

The court holds that, by accepting the check and retaining the account without telling the defendant that he was not willing to accept less than was due, the plaintiff cannot recover. The defendant should know as well as the plaintiff that it had not paid according to its contract. But, whether the plaintiff was chargeable with legal acumen superior to that of the defendant or not, I think he should be permitted to recover.

Whether the transaction be considered from the standpoint of estoppel, of waiver, of accord and satisfaction, of an account stated, of acquiescence, of abandonment, or of a settlement, it still involves the question, Did plaintiff, by his failure to object to the accuracy of the account rendered, deprive himself of the right to collect what was justly his due? The rendering of an account, and its retention without objection after the lapse of time, becomes an account stated and *a strong proof of its correctness. Engfer v. Roemer,* 71 Wis. 11, 36 N. W. 618. A charge that, "where one man makes out an itemized statement of his accounts with another, and mails or hands it to such other, and it is retained without objection, this is in law a settlement," is incorrect. The act is not a settlement. Such facts "raise a presumption or inference of acquiescence. That is all. Such presumption or inference is more or less strong according to circumstances. The neglect to return or object may be for such a length of time as to render such presumption conclusive of acquiescence, *so as to make an account stated." Rose v. Bradley,* 91 Wis. 619, 623, 65 N. W. 509.

The cases of *Cobb v. Arundell,* 26 Wis. 553, and *Ryan D. Co. v. Hvambsahl,* 92 Wis. 62, 65 N. W. 873, hold that the sending of a statement of account by one party, and its reten-

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tion by the other without objection thereto, makes an account stated. Less than two months ago this court said:

"It is quite uniformly held that, when a demand in the form of a bill or account is delivered to the debtor, his conduct with reference thereto may be significant, and his failure to object within a reasonable time be construed *prima facie* as an admission that such bill or account is correct; not at all conclusive either on the fact of admission or on the fact of correctness, but *prima facie,* subject to be overcome by other evidence." *Jones v. De Muth,* 137 Wis. 120, 118 N. W. 542, 543.

But an account stated is only *prima facie* evidence that the balance struck is correct. *Jefferson Co. v. Jones,* 19 Wis. 51. While the incorrectness of a stated account may be shown, the evidence to surcharge it should be clear and satisfactory. *Wilson v. Runkel,* 38 Wis. 526; *Marsh v. Case,* 30 Wis. 531; *Hoyt v. McLaughlin,* 52 Wis. 280, 8 N. W. 889; *Hill v. Durand,* 58 Wis. 160, 15 N. W. 390. One of the late expressions of the court as to the effect of stating an account is that it is "only *prima facie* evidence of the correctness of the balance, and not conclusive upon it," and unless such balance is struck as the result of mutual concessions and a compromise, or the acts in reference thereto create an estoppel *in pais,* it "may be impeached for mistake or *error in law or in fact* with respect to the items included in it." *Segelke & K. Mfg. Co. v. Vincent,* 135 Wis. 237, 115 N. W. 806.

In many other jurisdictions the receipt and retention of an account without comment is only *prima facie* evidence of assent to the correctness thereof. 1 Cyc. 371, and cases cited. Even a settlement deliberately made may be set aside on clear proof of fraud or mistake. *Klauber v. Wright,* 52 Wis. 303, 8 N. W. 893; *Hill v. Durand, supra.*

The contract here furnishes proof conclusive that a mistake of law was made in stating this account, if it was stated, or in making the settlement, if one was made, unless we assume that it was the purpose of the plaintiff to give something

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to the defendant that did not belong to it, and that it was the purpose of the defendant to cheat the plaintiff out of something that belonged to him.

It would seem clear from the foregoing authorities that the failure of the plaintiff to object to the account did not preclude him from showing that it was erroneous. At best it was evidence tending to show assent on his part as to its correctness. But if the transaction amounted to stating an account, still the stated account was not conclusive. The fact that any weight at all should be given such retention proceeds upon the theory of an implied assent or admission that the contents of the paper are correct because not demurred to. Many courts hold that such action is no evidence of consent; others that it is weak evidence. The doctrine seems to have originated at the trial of Horne Tooke for treason (25 How. St. Tr. 1, 120), where treasonable letters found in his possession were offered in evidence against him on the theory that the receipt and retention of such letters by him without protest or objection to their contents was tantamount to an approval of such contents. Defendant's objection to the letters was not wanting in logic. The accused stated that he was afraid he was guilty of blasphemy as well as of treason, under the ruling of the court admitting the letters; that he received many curious letters that he did not answer, and that among them were some from a man named Oliver Overall, "who . . . endeavored to prove to me that he was God the Father, Son and Holy Ghost. He proved it from the Old Testament—in the first place that he was God the Father, because God is Overall; that is, God over all. He proved he was God the Son from the New Testament—'Verily, verily I am He;' that is, Veral I, Veral I, I am He. Now, if these letters written to me, which I from curiosity have preserved, but upon which I have taken no step, and to which I have given no answer, are produced against me, I do not know what may become of me." To which the chief justice replied: "If you can treat all the letters that

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have been found upon you with as much success as you have these letters of your correspondent, you will have no great reason for apprehension." The English court did not hold that the receipt and retention of this letter without protest would furnish proof conclusive of the crime of blasphemy.

The evolutionary progress of the law on the subject under consideration has led to the following results: (1) Receipt and retention of a statement of account without protest raises a presumption of assent to its correctness; (2) after the lapse of an indeterminate period, if the silence is continued, the statement so furnished automatically becomes an account stated; and (3) after the lapse of another indeterminate period, the account so stated automatically becomes conclusive of the rights of the parties. The last proposition is the result of the decision in this case, and it is with this that I particularly dissent.

The cases of *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, and *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563, rest upon an entirely different principle from that involved in this case, and I do not think they are authority for the decision here made.

DODGE, J. I concur with the foregoing dissenting opinion of Mr. Justice BARNES.

KERWIN, J. I concur in the foregoing dissenting opinion of Mr. Justice BARNES.

A motion for a rehearing was denied March 9, 1909.

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VOGEL and others, Plaintiffs in error, vs. THE STATE, Defendant in error.

December 2, 1908—March 9, 1909.

Rape: Evidence: Sufficiency: Review in appellate court: Corroboration: Jurors: Special venire prematurely issued: Harmless irregularity: Presence of accused, when necessary: Information: Conviction of persons aiding and abetting: Instructions to jury: Acts constituting one or several offenses: Election as to particular act: Waiver: Res gestæ: *Impeachment of witnesses: Conviction of lesser offense: Fornication: Assault and battery: Arguments of counsel: Improper remarks: Immaterial error.*

1. Where the defense against a charge of rape is that there was fornication only, the courts hold to a strict rule of proof as to the essentials of the greater offense.
2. The refusal of the trial court to grant a new trial on the ground that the evidence is insufficient to support a conviction will not be disturbed by this court where the record contains evidence from which the guilt of the accused can fairly be deduced.
3. A conviction for rape may be had upon the uncorroborated testimony of the female assaulted.
4. The evidence in this case is *held* to warrant the conviction of rape.
5. Sec. 2533*d*, Stats. (1898), does not contemplate that a special venire shall be issued until the regular panel of jurors is actually exhausted; but the issuance of such a venire in this case two days before the trial began, in anticipation of the fact that a sufficient number of qualified jurors could not be obtained from the regular panel, is *held* not to have been prejudicial to the defendants, and the error or irregularity should be disregarded under secs. 2829, 4659.
6. The absence of the defendant when a special venire is ordered does not invalidate his conviction.
7. Under an information charging a party as principal he may be convicted on evidence showing that he was present and aided and abetted the principal felon in the commission of the crime, where the punishment for the actual commission of the offense and that for aiding and abetting in its commission are the same.
8. Thus, several persons may be convicted under an information charging them jointly with having committed rape, and it is not necessary that one of them should have been specifically charged with the crime and the others charged as aiders and abettors.

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9. On the trial of several persons jointly charged with rape the jury were instructed that to hold any two or more of the defendants guilty of that offense the evidence must establish that "*some one* of them" performed an act of intercourse under such circumstances that it constituted rape and that such others as are held guilty "assisted him by the exercise of force, or threats, or *otherwise*, in committing such particular act, or *procured* him to commit such act." *Held*, that the use of the word "otherwise" was not improper, since a defendant might be guilty of aiding and abetting without using force or making a threat.
10. Nor did the use of the word "procured" render the instruction erroneous, it being evidently used and understood as synonymous with "aided" or "abetted," and there being no testimony to which this part of the instruction could apply if it were intended to cover absentees who counseled the commission of the offense.
11. Three series of acts of intercourse at two different places during a period of two hours—there being testimony tending to show that not all of the defendants were present when any one act of intercourse took place—are *held* not to constitute a single offense but several distinct offenses.
12. By the instruction above quoted (in paragraph 9) the jury were clearly told that they must acquit unless they were all agreed upon some particular act constituting the offense and also agreed as to the particular defendant who actually performed that act and as to those who assisted him therein.
13. The right of the defendants in this case to have the state elect upon what particular act it relied to secure a conviction was waived by failure to request that such election be made and by a request for instruction showing that they consented to the submission of the case to the jury in the way it was submitted.
14. A charge to the jury that, in order to render a person guilty as an aider and abettor, "he must himself in some way aid or assist the other in overpowering the female, or in effecting a particular act of intercourse under circumstances such as to make such act rape," was not—especially in view of the evidence in the case—misleading or prejudicial as failing to inform the jury that the person aiding or abetting must be present at the commission of the offense.
15. Statements made by the prosecutrix, a short time after the commission of the offense, to those who had rescued her from defendants and were taking her to a neighboring house, in reply to their questions as to what defendants had done to her and why she did not yell, are *held* to have been admissible as part of the *res gestæ*.

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16. A witness for the state had written an account of the crime for a newspaper, but testified that it was not published as he wrote it. This testimony was not contradicted. Defendants offered in evidence the published article (which was claimed to give a very distorted account of the affair) for the purpose of showing bias on the part of the witness and of otherwise impeaching his testimony. *Held* that, in view of the uncontradicted testimony that the article was not published as written, it was properly excluded.
17. A person cannot be convicted of fornication under an information charging rape.
18. Refusal to instruct the jury that, under the information charging rape, defendants not guilty of that offense might be found guilty of assault and battery, was not error prejudicial to the defendants.
19. It is not error to refuse requested instructions which are adequately and fairly covered in the general charge or which relate to mere evidentiary matters.
20. A misstatement by the district attorney, in his argument to the jury, as to the time within which admitted acts of intercourse by defendants with the prosecutrix occurred, is *held* to have been harmless, in view of the trial court's direction to the jury to recall the testimony and not take counsel's statement on either side for what it was.
21. Language used by the district attorney in his argument to the jury, characterizing a witness as a "disreputable, dirty pup of a liar," is disapproved, but it was proper for him to comment upon the contradictory statements which the witness admitted having made, for the purpose of impeaching his credibility.
22. Statements by the district attorney, in his argument to the jury, that if the prosecutrix "was your or my girl, you wouldn't have waited to have a trial in court," and that "the people of the country are watching this case, and when they have another case like this they will have a lynching bee," are *held* improper and reprehensible, but not so prejudicial as to work a reversal of the conviction, where the trial court told the jury that such remarks were improper and admonished them to decide the case according to the evidence and to acquit the defendants, without regard to any other case or to the future, unless their guilt was established beyond a reasonable doubt.
23. Considerable latitude must be allowed counsel in arguing cases, and a judgment should not be reversed because of improper remarks unless this court is satisfied that the jury was not sufficiently instructed to disregard them or they appear to be so flagrant that they must have been prejudicial notwithstanding any admonition that may have been given by the trial court.

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ERROR to review a judgment of the circuit court for Clark county: CHESTER A. FOWLER, Judge. *Affirmed.*

Writ of error to review conviction for rape and ten years' sentence to the state reformatory. The defendants were jointly arraigned upon an information containing one count, which, omitting the formal parts, alleges as follows:

"That on the 29th day of June, A. D. 1907, at said county, *Matthew Vogel, Joseph Christman, Peter Christman, Anthony J. Christman,* and *Henry Vogel* did, with force and arms, in and upon one Anna Engelbretson, of the age of fourteen years and more, to wit, of the age of eighteen years, violently and feloniously make an assault, and her, the said Anna Engelbretson, then and there, by force and against her will, violently and feloniously did ravish and carnally know, against the peace and dignity of the state of Wisconsin."

All of the parties involved attended a dance held at John Lempke's barn on the night of June 29th. About 11 o'clock the prosecutrix and another girl went to Lempke's house to get a drink of water, and on their return the prosecutrix was accosted by the defendant *Matthew Vogel.* The testimony of the prosecutrix is to the effect that said *Vogel* forcibly took her out of the yard and down the road to a clump of small trees on the roadside some twenty-four rods from the gate leading to the Lempke barn; that the other defendants followed them, and that all of the defendants had sexual intercourse with the prosecutrix forcibly and against her will at said place; that she was thereafter taken down the road some 500 feet further by the defendants, where they again committed the crime of rape upon her; that thereafter she was brought back to the place where the first alleged crime, or series of crimes, was committed, and the offense was repeated until the defendants were driven away by other parties appearing upon the scene.

The plaintiffs in error, who will hereafter, for the sake of brevity, be referred to as defendants, seek a reversal of the

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judgment of conviction on the following grounds: (1) The evidence is insufficient to support a conviction for the crime of rape. (2) The jury which tried the defendants was not legally impaneled. (3) The information was insufficient to support a judgment for conviction. (4) The court erred in charging the jury. (5) The court erred in refusing to charge the jury as requested by defendants. (6) The court erred in receiving and rejecting evidence to the prejudice of the defendants. (7) The judgment should be reversed because of prejudicial remarks made to the jury by the district attorney in the argument of the case.

For the plaintiffs in error there was a brief by *L. M. Sturdevant, R. J. MacBride, Homer C. Clark,* and *W. J. Rush,* and oral argument by *Mr. Sturdevant, Mr. MacBride,* and *Mr. Clark.*

For the defendant in error there was a brief by the *Attorney General* and *F. T. Tucker* and *J. E. Messerschmidt,* assistant attorneys general, and oral argument by *Mr. Tucker* and *Mr. Messerschmidt.*

The following opinion was filed January 5, 1909:

BARNES, J. We are urged with much earnestness to hold that the evidence is insufficient to sustain a verdict of guilty, and that therefore the judgment of conviction should be reversed and the defendants discharged. Many considerations are called to our attention to support this view, and some of them are not wanting in force and persuasive power. The credibility of the testimony of the alleged victim, as well as that of the principal witnesses tending to corroborate her story, is vigorously assailed. It is asserted that the condition of the clothing of the girl, Anna Engelbretson, after the commission of the alleged crime or crimes, and the condition of her body, demonstrated that she was not the victim of a series of criminal assaults. Her failure to promptly acquaint her

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parents, or other relatives, of the outrage, her alleged failure to make such outcries as might, and probably would, attract assistance, and the inherent improbability of at least a portion of her testimony, are said to furnish proof conclusive that the lesser offense of fornication only was committed. These, as well as other considerations, are forcefully pressed upon us with undoubted sincerity.

The abhorrent nature of the crime of rape so shocks every sensibility of manhood that a party even charged therewith has much to overcome where his defense is that the offense amounted to fornication only and not to the more heinous crime. As was said in *Brown v. State,* 127 Wis. 193, 199, 106 N. W. 536, "the proneness of woman, when she finds the fact of her disgrace discovered or likely of discovery, to minimize her fault by asserting *vis major,*" coupled with the impossibility of defense except by direct denial, has led the courts to a very strict rule of proof in such cases.

Five defendants were convicted on the trial of this case and are now under sentence for ten years each. The import as well as the importance of the case is such as to invite the closest scrutiny of the record, to the end that the court may satisfy itself therefrom, as far it can, whether the defendants were convicted of a crime they did not commit.

It is easy to perceive that the real issue in the case might readily have been lost sight of by the jury. The testimony of the defendants is less repulsive than that of their victim, because the element of force is denied; but, taking their testimony as they gave it, a person not learned in the refinements of the law might well feel inclined to say that a prison was the proper place in which to restrain their activities. The evidence given on the trial certainly makes a revolting if not an unique page in the annals of criminal law.

We fail to see where any detailed discussion of the evidence would be useful, except for the purpose of convincing counsel that it was carefully read and considered by the

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court, and except, perhaps, to gratify the appetites of morbid minds for salacious reading matter. Neither reason is sufficient, and we must decline to unnecessarily soil the pages of our reports by narrating the evidence in detail.

"Ordinarily the decision of the trial judge upon the question of granting a new trial on the ground that the evidence is insufficient to support the verdict is held conclusive upon this court; and this rule is adhered to in a criminal case where the record contains evidence from which the guilt of the accused can be fairly deduced." *Williams v. State,* 61 Wis. 281, 289, 21 N. W. 56; *Jambor v. State,* 75 Wis. 664, 673, 44 N. W. 963.

Having in mind the foregoing rule of law as to the weight that should be given to the verdict of a jury in a criminal case, and also to the refusal of the trial court to set it aside as not supported by the evidence, it is the judgment of every member of the court, reached after mature deliberation, that the verdict should not be set aside as unsupported by the testimony.

The jury found that at the time of the commission of the offense Anna Engelbretson was not a common prostitute. Upon the evidence it was entirely justified in so doing. With one exception the only witnesses who testified to former misconduct on her part, or to evil reputation, were three of the defendants, and a portion at least of their evidence was almost too fantastic for belief. The evidence of the witness Edward Wensel is improbable, though perhaps not incredible, but was in direct conflict with statements deliberately made by him to the district attorney and sheriff. He was evidently a companion of *Mattie Vogel's,* having worked with him in the woods, and, according to his own story, accompanied him on at least one of his amatory peregrinations. The evidence referred to was important only as bearing upon the credibility of the witness Anna Engelbretson. It is the settled law of this state that a conviction for rape may be had upon the uncorroborated evidence of the female assaulted.

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Brown v. State, 127 Wis. 193, 200, 106 N. W. 536; *Lanphere v. State,* 114 Wis. 193, 202, 89 N. W. 128; *Osgood v. State,* 64 Wis. 472, 474, 25 N. W. 529. It is not seriously contended, if the testimony of such female in this case is taken to be true, that she does not testify to facts which establish the commission of the crime. But it is asserted that her evidence bears upon its face the stamp of unreliability, and that therefore, under the rule in *Hofer v. State,* 130 Wis. 576, 586, 110 N. W. 391; *O'Boyle v. State,* 100 Wis. 296, 300, 75 N. W. 989; and *Brown v. State, supra,* the principal facts must be corroborated by other testimony.

So much of the evidence of the prosecutrix as relates how she was taken by the defendant *Mattie Vogel* from near the Lempke house to where the first act of intercourse took place hardly seems credible. Considering the close proximity of a number of other persons, no good reason is apparent why she might not by her cries have attracted assistance if she apprehended that a criminal assault was about to be committed upon her. The improbability of the story related by the prosecutrix, in the foregoing and some other particulars, detracts from the weight that should otherwise be given to her evidence. But, whatever was the purpose of the prosecutrix in leaving the dance with *Vogel,* or whether she went voluntarily or forcibly, does not argue that the acts of intercourse testified to with the other defendants, or acts with *Vogel* after they arrived, were voluntary on her part, and there is certainly no inherent improbability in her assertion that they were accomplished by force and against her will. Neither is there any improbability in her statement to the effect that during the time the last acts of intercourse took place she was physically exhausted and in a semi-unconscious condition and incapable alike of resistance or consent.

But it seems to us that the evidence of the prosecutrix was corroborated. The defendants, except *Peter Christman,* admitted acts of intercourse. As to him, the proof of sexual

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intercourse was almost conclusive. So the only material circumstance upon which corroboration was necessary was whether she offered that degree of resistance that was imperative in order to make the crime that of rape.

The house of William Catlin was about 150 feet from the point where the first acts of intercourse took place. Mrs. Catlin testified that she heard a girl cry, whom she took to be the prosecutrix, between 11:15 and 11:30 o'clock; that she got up and looked out the window and went back to bed again and was aroused again; that the dog growled and then she heard the girl scream; that she cried; that witness got up again and went to the window and heard the girl cry and beg for those boys to keep their hands off; that she said, "*Mat,* keep your hands off, and let me alone;" heard her say, "*Joe,* let me alone; *Pete,* keep your hands off. Let me alone. Let me go." Witness could not tell how many times she heard the prosecutrix scream, but no small number of times.

"She cried and screamed sometimes when they allowed her to. They told her to keep still and shut up her mouth and then she would keep still, and she would cry again and they told her to keep still. I heard this going on for at least an hour and a half."

The second series of acts of intercourse took place down the road about 500 feet from the first. In reference to what the witness heard after the parties left the first place she testified:

"I heard noise coming from the direction those people had gone down the road. I heard this girl scream, cry. I could not hear any words that she said. She cried quite steady when she was down there. She didn't stop but a minute or two at a time I don't think. I did not hear any one tell her to keep still, but I heard her cry, and she didn't cry right steady. I could not hear it steady. I saw what looked to be the same girl go up the road again. I saw this girl and three gentlemen come up the road. She tried to get away

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from them. They had hold of her, one of them. She got away and started to run towards our big gate. I don't think it was the one that had hold of her first, but another one grabbed her and told her to stand still and she did. Then they went . . . to the first place they started from. I heard the cry again in just a few minutes. She cried quite a few times, too, then."

The witness then stated that she saw one of the men go up where the dance was being held and that four men returned in a short time to where the girl was; that she then aroused her husband and dressed and started for the road and met Arthur Sayles and his wife, who were going home in a buggy; that she told Mr. Sayles some brutes were abusing a girl and showed him the place. Mr. Sayles asked the men if there was a girl there and one of them said "No." His wife remarked that there was, because she could hear her sob. Mr. Sayles then got out of the buggy and the men scattered. There were six of them. When the witness first got up there, some of the men were on the ground, and it looked as if they were sitting down and had hold of her. Her face was covered with something. *Pete Christman* was having intercourse with the girl. They helped her into the buggy. Her skirts were all loosened and her hair was down and her waist was all black and dirty and was torn on the back. The girl did not say anything to witness; she cried all the time.

The testimony of Mrs. Catlin as to what took place after Mr. Sayles came along is substantially corroborated by the evidence of Arthur Sayles, only he saw nothing over the face of the prosecutrix. He testified that *Peter Christman* was apparently having intercourse with her and that there was a man on either side of her, but that he could not say whether they had hold of her or not. They were possibly six inches or a foot away from her. He testified that after the men ran away the prosecutrix attempted to get up but fell back. Minnie Sayles corroborated the evidence given by her husband, Arthur Sayles. Mrs. Sayles, with Mrs. Catlin, took

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the prosecutrix in the buggy to the Lempke farm where the dance was held, and testified that she was crying so hard that she was scaring the horse, and that when she was taken out of the buggy at Lempke's she ran around and acted kind of wild.

The witness William Catlin testified that he heard a girl crying for help and that she wanted the fellows that had her to let her alone; that he heard the girl crying. He did not know how many times or how long he heard it, but it seemed possibly half an hour.

On the trial the defendant *Peter Christman* denied having intercourse with the prosecutrix. Her testimony in this regard, however, is corroborated by that of Mrs. Catlin and that of Mr. and Mrs. Sayles. It would appear that the corroborating evidence in this case was quite strong. If the girl cried and screamed as Mrs. Catlin testified she did, such action on her part certainly was not indicative of consent, but, on the contrary, tended directly to establish her claim that she resisted and that force was used to overcome such resistance.

It is argued that the established facts relating to the condition of the prosecutrix physically, and of her clothing, and to her failure to make an outcry when aid might be forthcoming, as well as her failure to notify her parents at once of the occurrence, render the corroborating evidence referred to unbelievable. It must be remembered that there were four or more able-bodied men taking part in the transaction, and that they should be able to overcome the struggles and the strength of a girl eighteen years of age, weighing about 125 pounds, without tearing off her clothing or clubbing or pounding her so that her body would show bruises.

The failure of the prosecutrix to relate the details of what occurred until the day following would ordinarily be a circumstance of much importance. It appeared, however, that her father had been advised, to some extent at least, by Arthur Sayles, of what had happened, even before his daugh-

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ter arrived at the Lempke place in the buggy with Mrs. Sayles. When he went out to where she was in the buggy he testified that she was crying bitterly and would not answer him, so that he thought she had lost her mind. He further testified that he stated that if he knew who dragged his girl in the dirt he would shoot them if they came upon his lot, whereupon the defendant *Peter Christman* promptly hit him upon the jaw for his temerity in objecting to the treatment accorded his daughter. This occurrence took place in the presence of the daughter, and the inference would not be violent that she supposed that some one had informed her father of the outrage. That the matter was common talk at the dance before it broke up seems apparent from the evidence of the defendant *Henry Vogel,* who testified that he would not walk home from the dance with the prosecutrix because of such talk.

But the case is not wanting in circumstances that tend to corroborate the evidence introduced on the part of the state. The prosecutrix lived with her parents on a farm. She went to school until she was seventeen. Thereafter she spent part of her time at home and part of it working out, apparently no great distance from home. No evidence was offered to show that she had a reputation of being unchaste, and the only evidence tending to show lascivious conduct on her part has already been epitomized. The Lempke barn at which the dance was held was not half a mile from her father's home, and was attended by her brother, her father, her mother, and two sisters. The attendants at the dance were principally her neighbors and acquaintances whom she had known for years. She appears from her evidence to have been a girl of ordinary intelligence and one who had some experience with the world outside of that gained in her family circle. She left, or was taken from, the dancing place at about 11 o'clock. The time of her return is not definitely fixed, but was probably about 1 o'clock. She could

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hardly escape knowing that promiscuous acts of intercourse, with such as were present at the dance and as were invited to participate by her companions or captors, would become common knowledge and common talk within a short time in the community in which she and her father and mother and brothers and sisters resided. She could hardly escape knowing that her shame would soon be bruited from mouth to mouth and that she would be looked upon with scorn and contumely by her childhood associates, her neighbors, and acquaintances. That she should have consented to twenty-two acts of sexual intercourse, which she testified took place, or eight acts, as testified to by defendants, most of the acts taking place in the presence of at least four of the defendants, and all within the space of a couple of hours, is well-nigh unbelievable. In any event it might well be a severe strain upon the credulity of the jury to believe it. The story would be of doubtful veracity if told of a hardened wanton cast among strangers. We deem further discussion of the evidence unnecessary. The province of the court is to examine the record to ascertain whether there was sufficient testimony to warrant the finding of the jury. We entertain no doubt that there was.

The trial of the case commenced before Judge FOWLER on January 6th. Judge O'NEILL of the Clark county circuit, anticipating that a sufficient number of qualified jurors could not be obtained from the regular panel, in the absence of the defendants, and on January 4th, issued a special venire to the sheriff for twenty jurors, returnable on January 6th. All but one of the jurors named in the special venire were reported present when court convened on such date. Appropriate objection was made to the manner adopted for selecting extra jurors, and due exception was taken to the adverse ruling of the court thereon. The regular panel was first exhausted without securing the requisite number of jurors, and recourse was then had to those summoned on the special

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venire. Error is alleged because of the method pursued in selecting the jury. It certainly would have been entirely proper for the court on January 4th to have ordered that the jury list be replenished from the list of names furnished by the jury commissioners under the provisions of sec. 2533*c*, Stats. (1898). In the absence of action by Judge O'NEILL it would have been competent for Judge FOWLER, under sec. 2533*d*, to have directed the sheriff to secure additional jurors from the county at large, or from the bystanders, to try this particular case, when the regular panel was exhausted. *Emery v. State,* 101 Wis. 627, 78 N. W. 145. Sec. 2533*d*, however, does not contemplate that a special venire shall be issued until the regular panel is actually exhausted. Conceding that the special venire was prematurely issued, it was no doubt issued to save time in the trial and expense to the county and not from any improper motive. Had Judge FOWLER entirely disregarded the special venire and directed the sheriff to summon talesmen from the bystanders or from the body of the county, that officer might call upon the identical persons attending court in pursuance of the action of Judge O'NEILL. No substantial claim is made that the sheriff did not perform his duty honestly, or that the defendants have suffered any actual prejudice by reason of the manner in which the jury was made up. The summoning of the talesmen in advance afforded defendants an opportunity to learn of any facts that might have a tendency to disqualify or render the parties selected undesirable jurors, which they would not have if action were delayed until the regular panel was exhausted. We do not think the irregularity, if such it may be called, is of sufficient moment to warrant a reversal of the judgment. Neither do we think the action taken by Judge O'NEILL was improper because of the absence of the defendants. The general panel of jurors is always selected without the presence of the parties they may be called upon to try for offenses. No very good

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reason is apparent why the same rule should not obtain in the case of a special venire. The presence of the defendants when a special venire is ordered does not appear to be necessary in order to secure a valid conviction. *Mabry v. State,* 50 Ark. 492, 8 S. W. 823; *State v. Allen,* 47 Conn. 121; *Cobb v. State,* 27 Ga. 648; *Pflueger v. State,* 46 Neb. 493, 64 N. W. 1094. It is true that in some of the cases cited the counsel for the defendants were present, but, where the law requires the presence of a defendant himself, it is very doubtful if the requirement can be supplied by the presence of his counsel. Sec. 4659, Stats. (1898), provides that no judgment in a criminal case shall be affected by reason of any defect or imperfection as to matters of form which shall not tend to the prejudice of the defendant. Sec. 2829, Stats. (1898), commands that this and all other courts shall, "in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." This statute applies to criminal as well as to civil actions. *Odette v. State,* 90 Wis. 258, 262, 62 N. W. 1054; *Cornell v. State,* 104 Wis. 527, 533, 80 N. W. 745. There is hardly a suggestion that the defendants were prejudiced in this case by the manner in which the jury was selected, and we conclude that there is no reversible error in this regard.

There was but one count in the information, and that charged the defendants jointly with having committed the crime of rape. The court charged the jury as follows:

"To hold any two or more of the defendants guilty of the offense here charged, the evidence must establish beyond a reasonable doubt that some one of them performed an act of intercourse with the prosecutrix, under the circumstances such as constituted the crime of rape, and that such others as are held guilty assisted him by the exercise of force, or threats, or *otherwise,* in committing such particular act, or *procured* him to commit such act."

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It is urged that under the information filed the defendants could not lawfully be convicted of aiding and abetting, and that one of the defendants should have been specifically charged with the commission of the crime of rape, and the other defendants should have been charged as aiders and abettors, in order to justify the charge of the court or a verdict of guilty. Sec. 4613, Stats. (1898), provides that:

"Every person who shall be aiding in the commission of any offense which shall be a felony or who shall be accessory thereto before the fact by counseling, hiring or otherwise procuring such felony to be committed, shall be punished in the same manner as is, or shall be, prescribed for the punishment of the principal felon."

An examination of the authorities convinces us that the law is well settled that under an information charging a party as principal he may be convicted on evidence showing that he was present and aided and abetted the principal felon in the commission of the crime, where the punishment for the actual commission of the offense and that for aiding and abetting in its commission are the same. Such an information informs the party that he has either actually perpetrated the offense set forth or has assisted some one else in doing so, and in either case he is equally guilty and has in fact committed the offense charged. *Comm. v. Chapman,* 11 Cush. 422; *Comm. v. Fortune,* 105 Mass. 592; *People v. Chapman,* 62 Mich. 280, 28 N. W. 896; *People v. Flynn,* 96 Mich. 276, 55 N. W. 834; *State v. Harris,* 150 Mo. 56, 51 S. W. 481; *People v. Batterson,* 50 Hun, 44, 2 N. Y. Supp. 376; *Kessler v. Comm.* 12 Bush, 18; *Strang v. People,* 24 Mich. 1; *State v. Comstock,* 46 Iowa, 265; *State v. Jordan,* 110 N. C. 491, 14 S. E. 752; *Dennis v. State,* 5 Ark. 230; *Reg. v. Crisham,* Carr. & M. 187. The text-book writers with substantial unanimity lay down the same rule. 1 Russ. Crimes, 230; 1 Ency. Pl. & Pr. 67; Archb. Crim. Prac. (Pom. 8th ed.) 1000 (*304); 22 Cyc. 374; 2 Bish. New Crim. Proc. (4th ed.) § 3.

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The case of *Shannon v. People,* 5 Mich. 71, cited by counsel for plaintiff in error, must be considered overruled by the subsequent decisions of the Michigan court. The two New York cases cited (*People v. Dumar,* 106 N. Y. 502, 13 N. E. 325, and *People v. Flaherty,* 162 N. Y. 532, 57 N. E. 73) are not contrary to the general current of authority under consideration. In *People v. Dumar* the court held as a matter of fact that the act with which the defendant was charged did not amount to aiding and abetting in the commission of the offense. In *People v. Flaherty* the question we are considering was not before the court and was not decided. The case of *State v. Gifford,* 19 Wash. 464, 53 Pac. 709, is in point, but is contrary to the decided weight of authority.

Error is also predicated on the instruction quoted because the court informed the jury that it might convict such of the defendants as assisted in the commission of the rape by force or threats or "otherwise," or "procured" the commission of the act. Objection is taken to the use of the word "otherwise." Its use was not improper and was harmless in any event. The attitude of the defendants might well have been such, at times, as to have convinced the prosecutrix that they stood ready to commit such acts of violence as were necessary for the accomplishment of the purpose for which they were present, and thus overawed her by their mere presence and numbers. A defendant might well be guilty of aiding and abetting without using force or making a threat. We apprehend that, if he stood in the roadway for the purpose of giving warning of the approach of some person who might be likely to render assistance, he would be abetting in the commission of the crime.

Exception is also taken to the use of the word "procured" as used in the instruction. It is urged that if any of the defendants procured the offense to be committed he was an accessory before the fact and should have been informed against as such under sec. 4614, Stats. (1898). Conceding the con-

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clusion to be correct, the premise is faulty. Those present assisting the one who personally commits the offense are aiders and abettors and are guilty as principals. Those who are absent, but who counseled the commission of the crime, are accessories before the fact. Bish. Stat. Crimes, § 139. To procure the commission of an offense does not necessarily imply absence. Procure means to obtain by any means; to bring about. Webst. Dict. It has no different significance in the law. 2 Bouv. Law Dict. 768; *Long v. State,* 23 Neb. 33, 45, 36 N. W. 310, 315. The court evidently used the word "procure" as synonymous with "aid" or "abet," and the jury could hardly have understood it otherwise. There was no evidence tending to show that any person was guilty as an accessory before the fact, as defined above, and no testimony to which this part of the instruction could apply, if it were intended to reach absentees who counseled the commission of the offense.

But the instruction is said to be faulty for another reason. There were three series of acts of intercourse at two different places between 11 o'clock at night and 1 o'clock in the morning. There is testimony, disputed however, tending to show that all of the defendants were not present when any one act of intercourse took place. It is asserted, and in this view a majority of the court concurs, that the entire transaction as shown by the testimony did not constitute a single offense, but that there was testimony tending to show several distinct offenses. The vice of the instruction is said to consist in the fact that the jury was authorized to return a verdict of guilty, though some of the jurors believed the crime to have been committed on one occasion and some on another, and all the jurors failed to agree on any one particular offense. This objection, if well taken, is fatal if the rule in *Boldt v. State,* 72 Wis. 7, 14, 38 N. W. 177, is adhered to, and we have no desire to overrule that case. We by no means agree with counsel's interpretation of the instruction.

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It is fair to presume that the jury took the law as the court gave it, and followed the instructions of the judge. By this particular instruction the jury was advised that, in order to convict two or more of the defendants, it should find, beyond a reasonable doubt, (1) that some one of the defendants performed an act of intercourse under such circumstances that it constituted the crime of rape; and (2) that such others as are held guilty assisted him in the performance of such act by the exercise of force and threats and such like. Clearly by this language the jury was told that all jurors must be agreed upon some particular act, or otherwise it must acquit.

The defendants were probably entitled to have the state elect upon what particular act it relied to secure a conviction. *Cornell v. State,* 104 Wis. 527, 80 N. W. 745; *State v. Pruitt,* 202 Mo. 49, 100 S. W. 431, 10 Am. & Eng. Ann. Cas. 654. They not only failed to request that such an election be made, but asked for the following instruction:

"If the jury should find from the evidence in this case that no rape was committed, either at the first place the first time, or at the second place, yet should find that a rape was committed at the first place the last time, near the grove or clump of trees referred to, then in that case they can only convict such of the defendants as were actually present at said last-named place and at that time, and whom the jury, upon the whole evidence to a moral certainty and beyond a reasonable doubt, find to have had sexual intercourse with the prosecutrix at the last-mentioned place."

This instruction was refused, and it is argued that such refusal was error. The instruction was properly refused because it was not correct in its entirety as a proposition of law. If given, only those who had sexual intercourse with the prosecutrix could have been convicted. It excluded conviction for aiding and abetting. Excluding the erroneous portion of the charge requested, the remainder was substantially given in the general charge. The request, however, is important in that it shows that no election was requested, and

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that defendants consented, as far as they might, to the submission of the case to the jury in the way it was submitted. This court has been liberal in holding that defendants in criminal actions may waive many things upon which they have the right to insist, if they elect so to do. *Cornell v. State, supra; Emery v. State,* 101 Wis. 627, 78 N. W. 145; *Miller v. State,* 25 Wis. 384; *Williams v. State,* 61 Wis. 281, 292, 21 N. W. 56. If the right to require an election existed it was waived.

Still another objection is made to the charge quoted. It is said that under it the jury might not be agreed as to who performed the act of intercourse and was therefore principal in the first degree, and who were guilty as principals in the second degree by reason of the aid given toward the accomplishment of the rape. Inasmuch as the offense in either case is the same, there are decisions which hold that it is not error to submit the case as it is claimed it was here submitted. *People v. Flynn,* 96 Mich. 276, 55 N. W. 834; *State v. Handy* (Del.) 66 Atl. 336. Under the information charging the defendants with having jointly committed the crime of rape the trial court was of the opinion that the defendants could only be convicted of one offense, in which all must participate who were found guilty. There is authority to support the view of the court. 1 Bish. New Crim. Law, § 802; *O'Connell v. Reg.* 11 Clark & Fin. 155. If erroneous, it was favorable to the defendants, so they have no cause for complaint. If the jury followed the direction of the court it must have agreed that some single act of intercourse was performed by some defendant under circumstances such as to make his crime that of rape, and it must have found that the other defendants aided him in the commission of that particular act. This method of procedure necessitated the jury's agreeing upon some act at which it believed all the defendants were present, and, it would seem, necessitated its agreement upon some one person as principal in the first degree.

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Having agreed upon the particular act of intercourse which constituted the crime, there could be little room for conjecture upon the testimony as to who actually did the act and who assisted him. So, when the court told the jury that it must agree that *some one* of the defendants performed an act of intercourse with the prosecutrix under circumstances which made the act rape, it does not follow that the jury was at liberty under the instruction to arrive at different conclusions as to the identity of such party. The words "some one" as used in the charge are not equivalent to saying "either" or "any one," but rather mean a particular person, taking such words in the connection in which they occur.

In reference to what a person must do in order to be guilty of the crime of rape as an aider and abettor the court charged the jury as follows:

"In order to render himself so responsible he must himself in some way aid or assist the other in overpowering the female, or in effecting a particular act of intercourse under circumstances such as to make such act rape."

It is argued that this instruction is erroneous because the jury was not informed that the person aiding or abetting must be actively or constructively present at the commission of the offense. It is true the word "present" was not used by the court, but it is difficult to see how an absentee could assist the principal felon in overpowering the female or in effecting the act of intercourse which constituted the crime. The language of the charge complained of, considering the evidence in the case, was neither misleading nor prejudicial to the defendants.

When the witness Arthur Sayles appeared upon the scene and the defendants scattered he had some conversation with the prosecutrix. He testified on the trial, under objection, that he asked her if they had done anything to her which they ought not to have done, and that she replied, "My God, I don't know what they didn't do." Mrs. William Catlin

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testified to the same conversation, also under objection. Mrs. Catlin was also permitted to testify under objection that while she was proceeding in the buggy from the place where the prosecutrix was found to the Lempke house she asked her why she did not yell, to which she replied, "I didn't dare." It is asserted that this testimony was hearsay and self-serving and should have been excluded. Considering the condition in which the evidence showed the prosecutrix to be when found, and the short time that elapsed between her discovery by the witness and the making of the statement, and the surrounding conditions, the testimony was receivable as part of the *res gestæ*. Were it otherwise, it is not of sufficient moment to warrant a reversal of the judgment.

An article was published in the Milwaukee Free Press giving what was claimed to be a very distorted account of the affair and one which it is claimed greatly exaggerated the facts to the prejudice of the defendants. The witness Arthur Sayles testified that he wrote the matter up for the Milwaukee Free Press, but denied that the article was published as he wrote it. The defendants sought to introduce in evidence a copy of the newspaper in question for the purpose of showing bias on the part of the witness and of otherwise impeaching his testimony. The evidence was excluded by the court. In view of the testimony given by the witness that the article was not written by him as published, and there being no testimony in the case to show that his evidence in this regard was not correct, the ruling of the court in excluding it was right.

Two other errors are assigned on the admission of evidence, but we regard them as being too trifling and inconsequential to merit special attention.

The court was asked to instruct the jury that if it should find the defendants, or any of them, not guilty of rape, it might find such defendants guilty of fornication if convinced of their guilt beyond a reasonable doubt. The instruction was

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refused. The ruling of the court in this regard was correct. *State v. Shear,* 51 Wis. 460, 8 N. W. 287.

The court was likewise requested to charge the jury that it might find such of the defendants as were not guilty of rape guilty of assault and battery, provided such offense was proven to its satisfaction and beyond a reasonable doubt. This request was likewise denied. It would have been entirely proper to have given this instruction, but the refusal so to do was not error. *Hempton v. State,* 111 Wis. 127, 86 N. W. 596; *Murphy v. State,* 108 Wis. 112, 83 N. W. 1112.

Instructions were requested with reference to the "presumption of innocence," "burden of proof," and "reasonable doubt." These subjects were adequately and fairly covered in the general charge.

Some other requests to charge were made and refused. The subjects embraced in such requests were either covered by the general charge or related to mere evidentiary matters, and were properly refused. They were not considered by counsel to be of sufficient moment to warrant discussion in their brief or at the bar.

The district attorney, in explaining why the witness William Catlin did not go out of his house to assist the prosecutrix, stated, "He did not have any gun in the house." An objection was made to this remark and it was withdrawn. The statement was not justified by any evidence in the case and was improper. The district attorney also stated, in substance, that the defendants testified that they had connection with the prosecutrix eight times in an hour. On objection being made to this remark the court stated to the jury that it would recall the testimony and not take counsel's statement on either side for what it was. The statement as to the number of acts of intercourse admitted by the defendants was correct, but the time within which they occurred does not appear to have been accurately stated. The matter of time was not of any great moment, and, in view of the caution given

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Vogel v. State, 138 Wis. 315.

by the court to the jury, the statement was harmless. Commenting on the testimony of Edward Wensel the district attorney said: "There was a man that was the most disreputable, dirty pup of a liar that ever went on the witness stand. He came to my office there and—" At this point he was interrupted by the defendants' counsel objecting to what Mr. Wensel said to him in his office unless it is evidence. No objection seems to have been taken to the statement that Wensel was a "liar" and a "pup," but objection was taken to the action of the district attorney in attempting to state what Wensel told him in his office. It was entirely competent and proper for the district attorney to allude to that conversation, if he proposed to state it correctly, and we must assume that he did. Wensel testified:

"I was subpœnaed in this case at the time of the preliminary examination. In the district attorney's office at that time I said, in the presence of the district attorney and the sheriff, that I had never had connection with Anna Engelbretson in my life. I said that I did not know Anna Engelbretson, had never heard any talk about her, and that, as far as I knew her, she was a decent, respectable girl."

In view of the testimony given by the witness on the trial, to the effect that he knew the prosecutrix and had had sexual intercourse with her before the occurrence of the alleged rape, it was proper for the district attorney to comment on this statement which he admitted making, for the purpose of impeaching his credibility. We cannot approve of the language of the district attorney in characterizing the witness, even if he believed it to be true, but no exception was taken to that.

The district attorney also made the following statement: "And if that was your or my girl, you wouldn't have waited to have a trial in court." And again: "The people of the country, from coast to coast, are watching this case, and when they have another case like this they will have a lynching

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bee." In reference to the foregoing the court said to the jury:

"I think that statement of the district attorney is improper. You will decide this case according to the evidence which has been introduced here. If the evidence shows beyond a reasonable doubt that the offense of rape has been committed by any of these defendants as explained to you by the court, you will find them guilty; but if their guilt is not so established you will acquit them, and do so, of course, without regard to some other case or without regard to the future."

The remarks of the district attorney last quoted are subject to just animadversion and are reprehensible. The case was one well calculated to excite prejudice, and for this reason, if for no other, a reasonable degree of caution should be exercised in presenting the case to the jury. Considerable latitude must be allowed counsel in arguing cases, and it is only when this court is satisfied that the jury has not been sufficiently instructed by the court to disregard such remarks, or they appear to be so flagrant that they must have been prejudicial notwithstanding any admonition that may have been given by the court, that a judgment should be reversed because of them. Were it not for the admonition of the court in reference to the last statement made, it would have been reversible error under the decision in *Gutzman v. Clancy*, 114 Wis. 589, 597, 90 N. W. 1081, and cases there cited.

On the whole, we think the charge of the trial court, as well as his conduct of the trial, was eminently fair toward the defendants, and that no prejudicial error was committed.

By the Court.—Judgment affirmed.

DODGE, J., dissents.

A motion for a rehearing was denied March 9, 1909.

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MEO, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

January 6—March 9, 1909.

Railroads: Injury to employee: Negligence of co-employee: "Risk peculiar to the operation of railroads."

While a section gang, including plaintiff, was engaged in unloading, from a handcar standing on a main track, old rails which they had removed from the roadbed some distance away and had transported on the car to the place of unloading, plaintiff was injured by a rail which was suddenly dropped or thrown to the ground by his fellow-servants. *Held*, that the injury was one arising "from a risk or hazard peculiar to the operation of railroads," within the meaning of sec. 1816, Stats. (1898), as amended by ch. 448, Laws of 1903, making a railroad company liable for such injuries even though caused by negligence of fellow-servants.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action for personal injuries. A section gang, of which plaintiff was a member, having been engaged in replacing old rails at some distance south of Kenosha, loaded the old rails upon a handcar and transported them to Kenosha, and, with the handcar standing upon the main track, were engaged in removing the rails to the ground; plaintiff standing astride of the west rail of the railroad track in order to lift and move the rail in question. The latter was suddenly dropped or thrown to the ground, whether with or without the customary command by the foreman is in dispute. It fell upon the plaintiff's foot, causing injury. The jury found (1) that the defendant's foreman did not negligently fail to warn the plaintiff that the rail was about to be thrown; (2) defendant did not negligently fail to furnish sufficient number of men to properly handle the rail; (3) plaintiff's injury was caused by the negligence of his fellow-servants in handling the rail in question; (4) such negligence was the proximate

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cause of the injury; (5) no contributory negligence; and (6) damages. After motions for the amendment of the verdict and judgment for the defendant the court entered judgment for the plaintiff, from which the defendant appeals.

The cause was submitted for the appellant on the briefs of *Edward M. Hyzer.*

M. G. O'Donnell, for the respondent

DODGE, J. The first contention to the effect that no negligence on the part of plaintiff's fellow-servants was shown must be overruled. The whole situation was before the jury, including plaintiff's position of peril. The question whether the men dropped the rail before the usual command had been given them was in conflict, and the inference whether the state of facts as found by the jury was such as to constitute negligence was one about which we think reasonable minds might differ.

It is urged that the injury is not within the description of sec. 1816, Stats. (1898), as amended by ch. 448, Laws of 1903, then in force, namely, one arising from a risk or hazard peculiar to the operation of railroads. We can discover no distinction in that regard from the situation presented in *Hardt v. C., M. & St. P. R. Co.* 130 Wis. 512, 522, 110 N. W. 427, and consider the discussion in that case entirely applicable to this. The work in progress was transportation, one of the distinguishing characteristics of railroad business. *Chicago, K. & W. R. Co. v. Pontius,* 157 U. S. 209, 15 Sup. Ct. 585. The circumstances under which it was done, with necessity for haste from threat of frequent passing trains, and the embarrassment of standing ground by rails and ties, bring it fully within any fair meaning of the words of the statute.

By the Court.—Judgment affirmed.

MARSHALL, J., dissents.

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YEZICK, Appellant, vs. CHICAGO BRASS COMPANY, Respondent.

January 8—March 9, 1909.

Master and servant: Injury: Dangerous working place: Evidence: Assumption of risk.

1. **In an action for injuries to a helper in a brass foundry, alleged to have been caused by a defect in the platform on which he was working, the evidence is *held* to establish, contrary to the verdict of the jury, that the platform was reasonably safe when he went to work on the morning of the accident, and not to show any negligence or failure of duty on the part of the defendant in respect to keeping it safe.**
2. **If, after plaintiff began work on the platform on the morning in question, the boards thereof were burned or became displaced so as to render the place dangerous, the defect or danger being as readily discoverable by him as by any other person in defendant's employ, he must be held to have assumed the risk of injury.**

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries alleged to be due to the negligence of the defendant. The defendant operated a brass foundry at Kenosha, Wisconsin. In the foundry the metal pots and crucibles for melting the brass were placed in a row containing thirty-two pots. Four cranes were provided for handling the pots of molten metal, each crane being expected to handle eight of the pots. The divisions of the pots made by the cranes were designated as "floors" among those working in the foundry. The metal pots are somewhat larger than an ordinary water pail and are placed about two feet apart. In front of the row of pots is a platform about four feet wide supported by a framework of iron. The part of the platform in front of the first floor of pots was made of strips of sheet iron. The remainder of the platform was made of loose pine boards resting on the iron

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framework. The ashes and cinders from the fires under the crucibles are removed and placed in an ash pit underneath the platform. For doing this work the loose boards are removed from the platform, and after the ashes have been removed the boards are replaced upon the iron framework. Hot cinders and bits of fire are sometimes carried from the fires which are about the iron pots containing the brass when these pots are raised from the crucibles with the cranes in order to pour the molten metal into molds, and these hot cinders and bits of fire at times drop onto the pine boards and set them afire. The molten metal is sometimes spilled upon the boards and sets fire to them. These fires are extinguished by the workmen with water standing near in pails.

The iron pots have metal covers which slide back and forth. An iron rod with a bent end to be placed in a hole in a projecting knob on these metal covers is provided for pushing back the covers to determine the condition of the brass in the pots. The workers are more or less accustomed to push off the covers by a kick upon these knobs. A caster and one or two helpers are engaged on each floor of pots. Plaintiff was a helper when he was injured. The defendant had provided a carpenter for replacing the boards which might be burned or otherwise damaged. Defects were reported by the caster and transmitted to the carpenter.

Plaintiff when he was injured was kicking or pushing off the cover of one of the pots on the third floor in order to determine whether the metal was ready for pouring. In doing this the board under his left foot tipped or broke. His left foot went into the ashes under the platform and his right foot was plunged into the pot of molten metal, causing the injuries for which he seeks damages. The injury was sustained between 8 and 9 o'clock on a Monday morning. The plaintiff had been at work for something over four hours. The evidence showed that on the previous Saturday evening, between the hours of 9 and 11, the platform had been left in repair

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by the carpenter and had been swept and inspected by the caster who had charge of the pots on floor 3 and by him found sound.

The jury found that the defendant had negligently permitted a defect to exist in the platform and that it had existed for a sufficiently long time for the defendant in the exercise of ordinary care to have repaired it. Plaintiff was found to have been free from contributory negligence. The court granted defendant's motion for judgment notwithstanding the verdict, holding that the evidence failed to show that the defendant was negligent as charged, and that, if the floor was defective and unsafe, the plaintiff in the exercise of ordinary care knew it or ought to have known it. This is an appeal from the judgment so ordered.

For the appellant there was a brief by *Calvin Stewart* and *Wallace Ingalls,* and oral argument by *Mr. Ingalls.*

For the respondent there was a brief by *Harper & McMynn,* attorneys, and *Peter Fisher,* of counsel, and oral argument by *R. N. McMynn.*

SIEBECKER, J. The plaintiff's objection to the dismissal of his complaint, on the ground that defendant's liability was not established, presents, first, the inquiry: Does the evidence tend to show that the defendant negligently omitted to furnish plaintiff a safe place in which to work? It is contended that the evidence is sufficient to support the claim that the floor on which plaintiff worked at the time of injury was defective and unsafe. This claim calls for consideration of defendant's duty to provide a reasonably safe place for plaintiff to work in the double aspect of its duty to furnish him such a place when he was first put at work and its duty to exercise reasonable care to maintain the safety of this place during the time he continued to occupy it in the course of his service.

"A reasonably safe working place having been furnished the servant, the absolute duty in that regard is satisfied. Then becomes active the secondary duty to exercise ordinary

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care to preserve for the servant the reasonably safe condition of his working place. In case of its becoming unsafe during the course of his employment, and the servant receiving an injury thereby before the master has knowledge of the existence of the danger or has reasonable opportunity to obtain such knowledge, and reasonable opportunity to remedy the danger, he is not liable." *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48.

Applying these principles to the case before us, the first inquiry is: Was the working place furnished plaintiff by the defendant a reasonably safe one when he went to work on the morning of the Monday on which he was injured? Upon this subject we have the positive testimony of the carpenter that he examined the floors on Saturday and found them in good repair, that of the caster who swept and cleaned floor No. 3 and observed that it was in good condition, and that of another caster that he cleaned the floor adjoining the one complained of at 9 o'clock that night and then passed over the one in question and observed that it was in the condition in which it had been usually used. Other witnesses testified to the same effect. It also appears that the plaintiff had been working on these floors, knew of what material they were made, how the boards were placed over the ash pit, and that they lay loose on the iron framework. On the morning when he went to work he could see and observe it and saw nothing that indicated a defect. The only evidence relied on to warrant an inference that the floor was not safe when plaintiff went to work on Monday morning is plaintiff's statement that he heard the sound of a breaking board when he fell, and that of another witness who states that, when he looked at the place immediately after the plaintiff fell, he saw that one board was tipped. The plaintiff's statement that he heard the noise of a breaking board cannot be held to show that the board was defective and broke, because the direct testimony of all who saw the board thereafter is that they found that it was not broken and that it was in its place. This evidence, therefore, is too vague, uncertain, and speculative to permit of an infer-

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ence that the place was not safe, as to the strength of the boards, when the plaintiff went to work in the morning. The statement that the board was tipped is not evidence that it was defective, for it appears that all of the boards over the ash pit were loose and could be turned up. There is no claim that the manner in which this floor was constructed constituted a defect, and, as was shown, it was constructed in that way to enable defendant to empty the ash pits underneath. The evidence therefore established that the defendant furnished the plaintiff a reasonably safe place when he started work on Monday morning.

The inquiry then arises: Did defendant exercise reasonable care to preserve plaintiff's working place in a reasonably safe condition during the time he worked on the floor on Monday morning before he was injured? It is urged that, if the place was safe when the plaintiff began working Monday morning, the evidence tends to show that it became dangerous during the time it was being used that morning in prosecuting defendant's business, and that the defendant was negligent in not ascertaining its dangerous condition and in not repairing it before the injury. The trial court held that there was no evidence tending to show defendant negligent in this respect, and we find no evidential facts tending to support this contention. The defendant's representatives, charged with making repair of any defects which might arise during the working hours, were not informed or notified before the accident happened, by the casters or plaintiff, of any defects in this floor which, it is claimed, had arisen during the progress of the work during the morning. Nor is there evidence that they carelessly omitted to observe such defects or to give them proper attention during this period. Under such circumstances defendant's conduct is free from the charge of having negligently omitted performance of the duty to maintain a safe working place for the plaintiff.

It is asserted with confidence that the court erred in hold-

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ing that if the place became unsafe through defendant's negligence while the plaintiff was at work, then he is precluded from recovery because the defect was one obviously within his view and observation and he assumed the risks incident thereto. It seems clear that if, after plaintiff began work, the boards were burned or became displaced on the iron framework so as to render the place defective and dangerous, then this state of things would be as readily observed by the plaintiff as by any other person engaged in the service. The place was within his constant view and had been used by him continuously. As stated by the trial court in passing opinion on this point:

"An employee cannot . . . close his eyes and senses to dangers that are obvious or which, in the exercise of ordinary care, are discoverable, and then, when injured, claim immunity from responsibility."

It is manifest that if a defect such as is complained of existed, it was as readily discoverable by the plaintiff as by any other person in defendant's employ. Under these conditions the plaintiff must be held to have assumed the risk of injury and he cannot recover against the defendant. *Relyea v. Tomahawk P. & P. Co.* 110 Wis. 307, 85 N. W. 960; *Grams v. C. Reiss C. Co.* 125 Wis. 1, 102 N. W. 586; *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841; *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350.

The court properly awarded judgment dismissing the complaint.

By the Court.—Judgment affirmed.

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GAY, by guardian *ad litem*, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

January 9—March 9, 1909.

Street railways: Injury to passenger: Special verdict: Sufficiency: Inference of negligence from accident: Excessive damages.

1. Findings that the controller on an electric car was defective and out of repair at the time of an accident causing injury to a passenger, that the company had knowledge or ought to have known of such defective condition, and that "such negligence" was the proximate cause of the injury, do not amount to a finding of negligence, in the absence of any finding that the defect had existed for such length of time that the company might have repaired it before the accident.
2. An affirmative answer to the disjunctive question, Did the defendant know or ought it to have known of the defective condition of the controller? is not a sufficient finding of either fact.
3. An inference of negligence arising, under the doctrine of *res ipsa loquitur*, from the explosion or blowing out of the controller on an electric street car is *held* to have been met and overcome in this case by evidence showing, among other things, that such an accident might happen without any negligence on the part of the street railway company.
4. In an action for injuries to a passenger on a street car who was alleged to have suffered concussion of the spine, nervous shock, etc., it being found by the jury that plaintiff was not permanently injured, an award of $3,000 damages is *held* excessive.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff on account of the negligence of the defendant. The jury returned the following verdict:

"(1) Was the plaintiff, while a passenger on defendant's car, on the 20th day of June, 1903, injured? *A.* (by consent of counsel and direction of the court.) Yes.

"(2) Was the apparatus known as the 'controller' on the

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car in question, at the time of the accident, defective and out of repair? *A.* Yes.

"(3) If you answer the foregoing question in the affirmative, then answer this question, otherwise not: Did the defendant company have knowledge of the defective condition of the controller, or ought it to have known of such defective condition? *A.* Yes.

"(4) Was the motorman operating said car negligent in the performance of his duties as motorman? *A.* No.

"(5) If you answer the second, third, and fourth questions, or either of them, 'Yes,' then answer this question: Was such negligence the proximate cause of plaintiff's injury? *A.* Yes.

"(6) Was the plaintiff guilty of any want of ordinary care which proximately contributed to her injury? *A.* No.

"(7) Is plaintiff now suffering from a diseased heart? *A.* Yes.

"(8) If you answer the foregoing question in the affirmative, then answer this question, otherwise not: Was such diseased condition of the heart caused by the injury sustained by the plaintiff at the time and place in question? *A.* No.

"(9) Is the plaintiff suffering from traumatic neurosis? *A.* Yes.

"(10) If you answer the foregoing question in the affirmative, then answer this one, otherwise not: Was such traumatic neurosis caused by the injury sustained by the plaintiff at the time and place in question? *A.* No.

"(11) Was the injury sustained by the plaintiff at the time and place in question the inciting cause of the disease or the inability of which she now complains? *A.* No.

"(12) If the court should be of the opinion that the plaintiff is entitled to recover, in what sum do you assess her damages? *A.* $3,000."

The defendant made several motions upon the verdict, all of which were denied, and judgment was ordered for plaintiff upon the verdict. Judgment was entered accordingly, from which this appeal was taken.

Clarke M. Rosecrantz, for the appellant, contended, *inter alia,* that under the proofs the plaintiff could not invoke the

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doctrine of *res ipsa loquitur* for the purpose of proving a defect in the controller. In order that the mere happening of an accident may be deemed in law proof of the ultimate fact of negligence, the degree of probability must be such as arises from a situation where the accident could not well happen except from a responsible cause. *Kirst v. M., L. S. & W. R. Co.* 46 Wis. 489, 491; *Lockwood v. C. & N. W. R. Co.* 55 Wis. 50, 64; *Kendall v. Boston,* 118 Mass. 234, 236; *Cummings v. Nat. F. Co.* 60 Wis. 603, 612; *Atkinson v. Goodrich T. Co.* 69 Wis. 5, 16; *Stacy v. M., L. S. & W. R. Co.* 85 Wis. 225, 234; *Carroll v. C., B. & N. R. Co.* 99 Wis. 399, 402; *Spille v. Wis. B. & I. Co.* 105 Wis. 340, 349; *Musbach v. Wis. C. Co.* 108 Wis. 57, 67; *Beyersdorf v. Cream City S. & D. Co.* 109 Wis. 456, 463; *Schultz v. C., M. & St. P. R. Co.* 116 Wis. 31, 33. Assuming that the existence of a defect in the controller may be inferred, there is no proof that the defect was seasonably known to the defendant, or that it was of such a character that it could have been seasonably discovered. *Hobbs v. Stauer,* 62 Wis. 108; *Schultz v. C., M. & St. P. R. Co.* 116 Wis. 31, 33; *Walkowski v. Penokee & G. Consol. Mines,* 115 Mich. 629, 41 L. R. A. 33, note on pp. 150–152; *Perry v. Mich. Cent. R. Co.* 108 Mich. 130; *Murphy v. G. N. R. Co.* 68 Minn. 526, 71 N. W. 662; *Georgia R. & B. Co. v. Nelms,* 83 Ga. 70.

For the respondent there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.* They argued, among other things, that the explosion of the controller raised a presumption of negligence on the part of the defendant and put the burden on it to absolutely overcome such presumption and *prima facie* case and point out the cause of the explosion and that the same was unavoidable by the utmost care. *Kirst v. M., L. S. & W. R. Co.* 46 Wis. 489; *Cummings v. Nat. F. Co.* 60 Wis. 603; *Carroll v. C., B. & N. R. Co.* 99 Wis. 399; *Musbach v. Wis. C. Co.* 108 Wis. 57, 67; *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525; *Montanye v.*

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Northern E. Mfg. Co. 127 Wis. 22; *Lipsky v. C. Reiss C. Co.* 136 Wis. 307, 117 N. W. 803; *Spellman v. Lincoln R. T. Co.* 36 Neb. 890, 20 L. R. A. 316; *Whalen v. Consolidated T. Co.* 61 N. J. Law, 606, 41 L. R. A. 836; *Feital v. M. R. Co.* 109 Mass. 398; *Baltimore & O. R. Co. v. Worthington,* 21 Md. 275, 283; *Philadelphia, W. & B. R. Co. v. Anderson,* 72 Md. 519, 20 Am. St. Rep. 483, note; *Wall v. Livezay,* 6 Colo. 465; *Smith v. St. Paul City R. Co.* 32 Minn. 1; *Nitroglycerine Case,* 15 Wall. 524; *Railroad Co. v. Pollard,* 22 Wall. 341; *Gleeson v. Va. M. R. Co.* 140 U. S. 435, 35 L. Ed. 438; *Chicago U. T. Co. v. Newmiller,* 215 Ill. 383, 74 N. E. 410; *Cincinnati, I. & W. R. Co. v. Bravard,* 38 Ind. App. 422, 76 N. E. 899; *Firebaugh v. Seattle E. Co.* 40 Wash. 658, 82 Pac. 995; *Lincoln T. Co. v. Webb,* 73 Neb. 136, 102 N. W. 258.

KERWIN, J. The defendant is a corporation engaged in operating an electric street railway line in the city of Milwaukee for the carrying of passengers. On the 20th day of June, 1903, the time of the accident, the plaintiff was a passenger on the defendant's car, when the controller at the front end of the car operated by the motorman exploded or short-circuited and caused fire in the car. The passengers became excited, and in the rush and excitement the plaintiff was injured, which injury it is alleged was caused by the negligence of the defendant. Several grounds of negligence are alleged in the complaint, mainly in failure to provide proper appliances, failure to provide a proper motor, controller, circuit breaker, and fuse, and failure to inspect and properly operate the car. It is insisted by appellant (1) that there is no evidence to support the verdict on the question of defendant's negligence; (2) that the damages are excessive; and (3) that the verdict is insufficient to support a judgment in favor of the plaintiff.

We think it clear that the last objection is fatal to the judg-

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ment for two reasons: First, because there is no finding of negligence; and, second, because of the form of the third question. On the point that there is no finding of negligence in the verdict the jury found:

"(2) Was the apparatus known as the 'controller' on the car in question, at the time of the accident, defective and out of repair? *A.* Yes.

"(3) If you answer the foregoing question in the affirmative, then answer this question, otherwise not: Did the defendant company have knowledge of the defective condition of the controller, or ought it to have known of such defective condition? *A.* Yes."

"(5) If you answer the second, third, and fourth questions, or either of them, 'Yes,' then answer this question: Was such negligence the proximate cause of plaintiff's injury? *A.* Yes."

It will be seen that by the second question the jury found merely that a defect existed, and by the third that the defendant knew or ought to have known of the defective condition. There is no finding as to how long the defect existed before the injury. It might have occurred the instant before the accident and the defendant have immediate knowledge of it, but not for sufficient time before the accident to have remedied it. This state of facts satisfies the finding, but would not support a judgment, for want of a finding in some form to the effect that the defect had existed for such length of time before the injury as to enable the defendant to repair it. Nor does the finding of proximate cause in the fifth question help the matter, for it will be seen that this simply finds that "such negligence" was the proximate cause of the injury. "Such negligence" under the verdict could only refer to the third question and answer or the second and third, but these together or singly do not find the essential facts necessary to make a case. Moreover, the third question being in the alternative, there is no finding that the defendant knew or ought to have known of the defect. That this finding is in-

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sufficient has been ruled by this court and discussion of it is unnecessary. *Jewell v. C., St. P. & M. R. Co.* 54 Wis. 610, 617, 12 N. W. 83; *Sherman v. Menominee R. L. Co.* 77 Wis. 14, 45 N. W. 1079; *Gunther v. Ullrich,* 82 Wis. 222, 52 N. W. 88; *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934; *Dugal v. Chippewa Falls,* 101 Wis. 533, 77 N. W. 878; *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *Gehl v. Milwaukee P. Co.* 116 Wis. 263, 93 N. W. 26; *Lowe v. Ring,* 123 Wis. 370, 101 N. W. 698; *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809. The subject is considered in a late case in this court—*Du Cate v. Brighton,* 133 Wis. 628, 114 N. W. 103,—where the cases are collected and discussed. This case is directly in point and controls the question here. It follows that the judgment must be reversed.

It is also insisted by appellant that the damages are excessive. The jury found $3,000 damages. The injuries alleged in the complaint for which compensation is sought consisted of an alleged concussion of and injury to the spine and nervous shock, causing traumatic neurosis, and the result thereof including a diseased heart and a serious and permanent injury to the eye. The jury found in answer to the eighth question that the diseased condition of the heart was not caused by the injury sustained by the plaintiff at the time and place of injury, and by answer to the tenth question that the traumatic neurosis was not caused by the injury sustained by the plaintiff at the time and place in question, and further found in answer to the eleventh question that the injury sustained at the time and place in question was not the inciting cause of the disease or inability of which plaintiff complains in this action. So it seems clear under the findings of the jury that the plaintiff was not permanently injured, and in the absence of permanent injury the damages are excessive.

It is claimed on behalf of the respondent that an inference of negligence arose because of defect in the controller which caused it to blow out, hence the doctrine of *res ipsa loquitur*

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applies; while on the part of the appellant it is insisted that no such inference can be drawn because it appears from the evidence that the controller might have acted as it did without any negligence whatever on the part of the appellant, and further that, if inference of negligence could be said to have arisen, still the inference was completely met by the testimony, therefore no case of negligence was made on this ground. Since there must be a new trial we shall not go into any discussion of this question further than to say that we are of opinion that the *prima facie* case made raised an inference of negligence, but that that inference was fully met and overcome by the testimony on the part of the appellant.

The only remaining question is whether judgment should be ordered for the defendant or the cause remanded for a new trial. It is strenuously insisted by counsel for defendant that there has been no negligence shown; therefore, the defendant being entitled to judgment below, this court should now order it. The majority of the court, however, are of the opinion that the case should go back for a new trial.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

MILBRATH, Plaintiff in error, vs. THE STATE, Defendant in error.

January 9—March 9, 1909.

Criminal law: Acts done by or through corporation: Embezzlement: Conversion of money: Demand when unnecessary: Evidence: Instructions to jury.

1. **A corporation exists only in contemplation of law, and the legal fiction that it is a separate entity, though necessary for many purposes, cannot be urged to an intent and purpose not within the reason and policy of that fiction.**

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2. A person charged with a crime will not be heard to say in justification that he committed the act in his official capacity as officer of a corporation; nor to assert that acts in form corporate acts were not his acts merely because done by him through the instrumentality of a corporation which he controlled and dominated in all respects and which he employed for that purpose.
3. One may convert money of another to his own use by putting it into the treasury and mingling it with the funds of an insolvent corporation which is under his control and management and of which he is a stockholder and officer in charge; and the fact that the benefit which he receives is not equal to the whole amount of the money is not material.
4. Defendant and his partners in a loan and real-estate business, who had loaned on real-estate security certain money intrusted to them for that purpose, organized a corporation to carry on the business. They were the sole and controlling stockholders and officers therein, and turned over to it all the assets and business of the firm. Defendant was president. The money above mentioned was repaid at the office of the corporation in defendant's presence, was mingled with funds of the corporation, and was retained and used by it. The corporation was then insolvent, and defendant's account with it was overdrawn and continued so to be. The amount paid was credited on the books of the corporation to the owner of the money, but, for the purpose of concealing from her the fact that the principal had been repaid, the corporation, with defendant's knowledge, continued to pay interest to such owner as if the loan were still outstanding. Afterwards the corporation was adjudged bankrupt. *Held*, that the corporation was a mere instrumentality through which defendant had embezzled the money and converted it to his own use.
5. On the trial of the defendant for such embezzlement, evidence as to the organization, management, control, manner of doing business, and insolvency of the corporation was admissible.
6. It was not error in such case to charge the jury that the payments of interest to the owner after the principal had been paid in to the corporation were made by the defendant; nor to charge, as to the defendant and the secretary of the corporation who received the money when it was paid in, that they and each of them held it in trust for the owner.
7. Nor, in view of the uncontradicted evidence, was it error to charge the jury that it was not disputed that the owner of the money in question lost it by fraud; but this portion of the charge is not approved.

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8. It is not error to refuse to give requested instructions relating to matters sufficiently covered by the general charge.
9. Under the circumstances above stated, the fact that the money had been paid in to the corporation not being known to the owner until after the bankruptcy of the corporation, when demand therefor would have been useless, it is immaterial that no demand for the money was made upon the defendant before the prosecution.

ERROR to review a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

The plaintiff in error (hereinafter called defendant) was convicted in the said circuit court of the offense of embezzlement and sentenced to imprisonment for three years in the state prison. The information upon which the defendant was tried charged him, Edward J. Wagner, and William E. Milbrath, as agents and employees of Helena Mizer, having the care, custody, and possession of $300 of her money, with the embezzlement of said sum and the unlawful and fraudulent conversion thereof to their own use on February 27, 1903. A motion for a new trial was made and overruled, and the defendant assigns thirty-four errors, twenty-one of which relate to the admission of evidence, one to the refusal to discharge the defendant because the offense charged in the information had not been established, seven to the charge of the court, and five in refusing to instruct the jury as requested by defendant.

At the beginning of the first trial in the municipal court the defendant Edward J. Wagner, after the jury had been sworn, announced to the court that he would testify for the state. After having so testified, and at the conclusion of this trial, he was by order of the court discharged. The defendant William E. Milbrath was also discharged by the court at the conclusion of this trial upon the ground that no case had been made out against him. The jury disagreed and the case was removed to the circuit court, where the defendant was

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tried upon the same information as the sole defendant, and this trial resulted in the conviction which is here for review.

The cause was submitted for the plaintiff in error on the brief of *Julius E. Roehr,* and for the defendant in error on that of the *Attorney General* and *F. C. Eschweiler,* assistant district attorney of Milwaukee county.

Among other references upon the part of the plaintiff in error were the following: 10 Am. & Eng. Ency. of Law (2d ed.) 983, 992; secs. 4418, 4419, Stats. (1898); *State v. McFetridge,* 84 Wis. 473, 54 N. W. 1, 998; *Nonotuck S. Co. v. Flanders,* 87 Wis. 237, 58 N. W. 383; *Milwaukee T. Co. v. Fidelity & C. Co.* 92 Wis. 412, 66 N. W. 360; *Bates v. State,* 124 Wis. 612, 103 N. W. 251; *Albricht v. State,* 6 Wis. 74.

Among other references upon the part of the defendant in error were the following: *Bautz v. Adams,* 131 Wis. 152, 111 N. W. 69; *Thuemmler v. Barth,* 89 Wis. 381, 62 N. W. 94; *Sargeant v. Downey,* 49 Wis. 524, 5 N. W. 903; *State v. Miller,* 47 Wis. 530, 3 N. W. 31; *McAllister v. State,* 112 Wis. 496, 88 N. W. 212.

Timlin, J. I knew the defendant well. He had been for many years engaged in business at Milwaukee, respected, honored with confidential business patronage and with important public offices. He had reached the age of fifty-eight years and had children and grandchildren. I know of no sadder story than that of such a man in the afternoon of a well-spent life, under the pressure of unexpected business calamities and yielding to the delusions of hope, being tempted to lay his hands unlawfully upon the moneys of others intrusted to his keeping. I regret his misfortunes and sympathize with him in his misery, but neither regret nor sympathy can be allowed to swerve the mind from a consideration of the case according to law and the evidence.

The defendant, together with Edward J. Wagner and H. C. Roethlisberger, were copartners carrying on a real estate and

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loan business in the city of Milwaukee from prior to April 29, 1891, to June 6, 1894. On the former date they loaned to one Kafura for Conrad Mizer $300 of the money of the latter, taking a note and mortgage to secure the loan executed by Kafura to one Ferdinand Groth, a person from whom the defendant held a power of attorney authorizing him to make investments, release mortgages, etc. Groth had no interest in the matter. He merely allowed the defendant to use his name. The defendant, as attorney in fact of Groth, assigned this mortgage to Conrad Mizer, who assigned it to Helena Mizer, both assignments unrecorded. This making of loans upon mortgage security for other persons was part of the business of said copartnership. June 6, 1894, the said copartners incorporated under the name of the C. W. Milbrath Company, with an authorized capital of $36,000, for the purpose of buying, selling, and exchanging real estate and personal property, writing insurance, and loaning money. All the assets of the copartnership and its business were turned over to and became the property of this corporation, of which the defendant was president, Roethlisberger vice-president, and Wagner secretary and treasurer. The corporation had a large business of the kind authorized by its charter, kept accounts with each of its clients, and, when money was received to be loaned out by it, such money was usually credited to the client's account, debited to that account when loaned out, and the securities delivered to the owner of the money. Such an account was kept with Helena Mizer under the name of the "Mizer Estate" on the books of the corporation. In August, 1905, the corporation was adjudged a bankrupt and scheduled real and personal property, exclusive of incumbrances thereon, to the amount of $16,230.93. The amount of claims filed and allowed aggregated $55,561.65. April 27, 1903, Kafura paid his note and mortgage at the office of the corporation and received a satisfaction dated that day executed by the defendant as attorney in fact for Groth. At this time the only stock-

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holders in the corporation were the defendant and Wagner, who were also officers of the corporation and dominated and controlled it in all respects.

There was evidence from which the jury might infer that this money was delivered by Kafura to Wagner in the presence of the defendant and Wagner put it in the corporation safe. The account carried as "Conrad Mizer Estate" was credited on the books of the corporation with the money so paid. The money in question was put into the cash drawer in the safe and mingled with other moneys received by the corporation that day. The corporation had the use of the money, and it was deposited in the bank afterward to the general account of the corporation. The corporation continued to pay interest to Mrs. Mizer as if the loan was still outstanding for the purpose of concealing the fact from her that the principal of $300 had been paid by Kafura, and the defendant was aware of this. This was the way the corporation handled the moneys received from various clients for the purpose of loaning the same upon security. It never kept such money separate. At the time this money was received from Kafura the liabilities of the corporation largely exceeded its assets, and that condition continued down to the bankruptcy. At this time the defendant had overdrawn his account with the corporation to the amount of $31,000, Wagner had overdrawn to the amount of $10,000, the stock subscription of the defendant was $24,000 and that of Wagner $6,000, and this overdraft continued increasing up to the time of the bankruptcy. The money in question was delivered to the copartnership in the first instance for the purpose of investing the same upon security, and no other authority was ever given, and the corporation, so far as it could do so by action of its officers and stockholders, succeeded to the duties and liabilities of the precedent copartnership with respect to Mrs. Mizer.

The first twenty-one errors assigned by the defendant have relation to the question whether or not he could be convicted

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of embezzlement of this sum of $300 because of the creation and interposition of the corporation as above detailed, and because the information charges that the money in question was converted to the use of the defendant and Wagner and William E. Milbrath, the three persons present when the money was paid by Kafura.

The errors assigned in the admission of evidence challenge the correctness of rulings admitting the articles of incorporation, subscription agreement, and other corporate papers, evidence concerning who had direction and control of the corporation, the meetings of the stockholders and directors, and who were the stockholders. Also entries in the corporate books of account, including among other accounts the account of the defendant and that of Wagner and that of Helena Mizer, and the condition of such accounts and the records and files of the bankruptcy court relating to the bankruptcy of this corporation, and all the evidence tending to show transactions between Helena Mizer and the corporation.

Another class of errors assigned relate to evidence concerning other mortgages belonging to Helena Mizer in the possession or under the control of the corporation and the time of payment thereof, and evidence of payment of money to the corporation on account of other clients and on account of similar loans, which payments were not remitted by the corporation to the owners or accounted for to them, and with reference to the ability of the corporation to repay the moneys that had been paid to it between April 27, 1903, and the time of its bankruptcy.

It will readily be seen that all these errors are assigned upon the theory that this corporation intervened between the principal and the loan agents after the relation of principal and agent had been created as an independent responsible personality, which by reason of its intervention to some extent changed the relations theretofore existing between the defendant and the Mizer estate, and itself received and converted the

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$300 in question. No doubt a corporation is for many purposes a juristic person. Corporations, having the right to hold and enjoy property, to contract and be contracted with, to sue and be sued, may in all such matters as an artificial person assert the rights of property, contract, duty, or obligation which a natural person might assert. But we must not forget that a corporation exists only in contemplation of law. Its personification is a legal fiction necessary to the ascertainment and administration of the legal duties and rights, intrinsic and extrinsic, to the corporation, governing its internal administration or its relations to the commonwealth or to other persons. Without this legal fiction the rights and liabilities of the corporation, its members, and its creditors would frequently be lost in the maze of legal rules. But this personification of corporations has never been carried to the extent contended for here. When the corporation adopted articles of incorporation and thereby brought itself as to subsequent transactions within the law relative to incorporated bodies, it did not absolve the incorporators from duties or liabilities existing prior to the incorporation. If the defendant and Wagner chose to make this insolvent corporation, in which they were the sole and controlling stockholders and of which they were officers, the repository of trust funds collected by them, it had no other effect in the law than if they delivered such funds into the possession of any trustee or subordinate employee controlled by them, whose possession must be deemed their possession and whose acquisition must be deemed their acquisition. The corporation is in such case a mere instrumentality through and by means of which the natural persons in control thereof carry out their acts. This made it necessary and proper that the incorporation, organization, management, control, and manner of doing business, solvency or insolvency of the corporation, should be laid before the jury. And there was no error in the admission of evidence of the kind objected to reasonably necessary to show

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the true situation of affairs and the mode of conducting the business.

It is further contended that the evidence is insufficient to support the verdict of conviction, in that the receipt of the $300 by the defendant personally is not shown, and, further, that the information charged a conversion, not to the use of the corporation, but to the use of the persons who were its officers, including the defendant. From what has been said it must be apparent that there was sufficient evidence of the relation of principal and agent between Conrad Mizer and his successor in interest, Helena Mizer, and the copartnership of C. W. Milbrath & Co. in the first instance. The defendant knew of the payment of the loan by Kafura, and executed personally as attorney in fact for Groth at the time a release of the mortgage in question. The money was paid over in his presence and he knew that it did not belong to him. The evidence is ample to support the contention that it was put in the corporation safe and mingled with the funds of the insolvent corporation and deposited in its bank account with the consent and by the act of the defendant conjointly with Wagner. He must be held to have known of the insolvent condition of the corporation at the time and that such disposal of the money would have substantially the same effect as throwing it into the fire. He made no attempt to reinvest the money, but, on the other hand, concealed from his principal the fact that the money had been collected and in this manner disposed of by him by continuing to pay from the corporate funds interest upon this loan to his principal as if the loan were still outstanding and unpaid. There cannot be much doubt that this constituted a conversion of the money by the defendant and Wagner. But was the money converted to their own use? One may convert money of another to his own use by paying it out upon his private or personal debt. *Guenther v. State,* 137 Wis. 183, 118 N. W. 640. If this is true, he can convert the money to his own use by putting it

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into the treasury and mingling it with the funds of an insolvent corporation which is under his control and management and of which he is a stockholder and officer in charge. The benefit he receives in the first case by discharge of his personal debt is equal to the whole amount of the money so paid. The benefit which he receives in the second case is not equal to the whole amount of the money so paid. But the extent to which defendant was benefited does not constitute the test. It is paid to his own use in either case. It is paid into that which is a mere instrumentality created by him under sanction of law, but as much under his control and as subservient to his will as the furniture of his office or the books of account in which he records his transactions. Under such circumstances there is no room for the legal fiction of separate corporate personality or for distinction between the defendant's acts as officer of the corporation and his acts as an independent natural person.

In *Haynes v. Kenosha E. R. Co.* 139 Wis. 227, 119 N. W. 568, where one person owned the majority of the shares of stock in each of three corporations, in each of which he was the principal managing officer and in each of which he controlled the board of directors, and these corporations through such person made certain corporate contracts between themselves, this court, speaking of the corporations, said:

"When he 'met' with himself, they met if he so willed. His unhampered authority to dictate was questioned by no one. He was simply dealing with his own property through a corporate agency as absolutely as he might deal with it as an individual. We must look to his intent to some extent to determine just which corporate entity owned the property we are dealing with."

In *Pott v. Schmucker,* 84 Md. 535, 36 Atl. 592, 57 Am. St. Rep. 415, where one of the partners of an insolvent firm owning a separate business procured a charter of incorporation, turned over all the assets of the separate business to this corporation and took all its shares of stock except certain quali-

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fication shares, and both the partnership and the corporation were in liquidation, it was held that in marshaling the assets for the benefit of creditors the court would not look at the corporation as a separate legal entity, but would look back of and beyond the charter and into the real substantial nature of the transactions.

In *Hoffman S. C. Co. v. Cumberland C. & I. Co.* 16 Md. 456, the question of independent and separate corporate personality was also disregarded. Conversely, acts of the shareholders and trustees attempted to be performed in their personal or individual capacity may as to the state be acts of the corporation, as in *People v. North River S. R. Co.* 121 N. Y. 582, 24 N. E. 834, where it was said:

"The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law, and the substantial inquiry always is what in a given case has been that collective action and agency. As between the corporation and those with whom it deals the manner of its exercise usually is material, but as between it and the state the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct."

In *State ex rel. v. Standard O. Co.* 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, it was said that the legal fiction that a corporation is a person can never be urged to an intent and purpose not within the reason and policy of that fiction. Cases not within the reason and policy of that fiction must necessarily be rare, and no general rule that we are aware of has been in that respect formulated. But it is safe to say that in a criminal prosecution against a person charged with an offense committed by him against the laws of the state he could not be heard to say in justification that he committed that offense in his official capacity as officer of a corporation; nor

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could he assert that acts in form corporate acts were not his acts merely because carried out by him through the instrumentality of a corporation which he controlled and dominated in all respects and which he employed for that purpose. *Hempfling v. Burr,* 59 Mich. 294, 26 N. W. 496. Other acts of embezzlement, see *People v. Hawkins,* 106 Mich. 479, 64 N. W. 736; *Paulson v. State,* 118 Wis. 89, 99, 94 N. W. 771.

We must regard these assignments of error as if the defendant and Wagner were both on trial.

The foregoing considerations dispose of, adversely to the defendant, the contention that it was erroneous to charge the jury as follows:

"Further, it is undisputed that Helena Mizer was not informed, either by the defendant or Wagner, of the payment of the money by Kafura, but that from time to time thereafter for a period of two years or more she was paid interest thereon by the defendant, *Charles W. Milbrath.*"

It is claimed that these payments were made to her by the corporation acting through its officers, but under the circumstances above detailed it was not incorrect to say that these interest payments were made by the defendant. So it was not error for the court to charge the jury:

"But the question for you to decide is: Did the defendant, *Charles W. Milbrath,* unlawfully and feloniously embezzle and fraudulently convert to his own use or to the use of some other person than the owner $300 or some part thereof of the money of Helena Mizer without her consent when *C. W. Milbrath* and E. J. Wagner were acting as her servants, agents, and employees, under the testimony and circumstances shown by the testimony."

Nor was it error to inform the jury that this $300 was not the money of C. W. Milbrath & Co., but was the money of Helena Mizer, because the evidence on that point is without substantial contradiction. There was no error in instructing the jury, with respect to the defendant and Wagner and concerning the $300 in question, "that they and each of them held it in trust for her," meaning Helena Mizer. Nor was

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there any prejudicial error in charging the jury that before they could convict the defendant they must find from the evidence in the case that he intended to convert to his own use, or to the use of some person other than the owner, the money, or some part of it, belonging to Helena Mizer. The evidence being without dispute and all the facts and circumstances before the court, and the only conversion shown or claimed being a conversion to the use of the defendant and Wagner or else to the use of this corporation, the jury could not have been misled by this instruction.

It is further contended that the court erred in instructing the jury as follows: "It is not disputed that Helena Mizer lost her money by fraud." The accused, Wagner, who became a witness for the state, who had charge of this transaction with the defendant and co-operated with him in the control and management of the corporation, testified without contradiction that the receipt of this money by the corporation from Kafura was concealed from Helena Mizer by himself and the defendant, and interest paid to her semi-annually as if the loan were still outstanding, for the purpose of giving her the impression that her money had not been collected and was not in their hands. It can scarcely be claimed that this was not fraud, and if this fraud was not the sole cause of the loss of her money it must have contributed very materially to that result, because the object of the concealment was to prevent her from drawing out this money or demanding it, and it is reasonably probable that, had she done so within the first year after the receipt of the money by the corporation, it would have been paid over. This portion of the charge is not approved. But, in view of the uncontradicted evidence on this point, it cannot be said to have been prejudicial to the defendant.

The first request to charge which is called to our attention is substantially to the effect that it would not be sufficient to show that the money in question was converted by the defendant to the use of the corporation, and the same is true of the

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third request forming the thirty-second assignment of error, and the fourth request forming the thirty-third assignment of error. We have already gone over this ground, and without further discussion must declare that these requests were properly refused.

The second request forming the thirty-first assignment of error we think related to matters sufficiently covered by the general charge, and the same is true of the request to charge forming the thirty-fourth assignment of error. The charge of the court, among other things, contained the following:

"You are to say and find from the evidence and circumstances surrounding the alleged commission of the offense whether the defendant did fraudulently convert the money of Helena Mizer to his own use, not merely that the money was converted, but that it was fraudulently converted. This must appear to your satisfaction beyond a reasonable doubt. . . . If you find the conversion and find that the person was defrauded by reason of it, it is your duty to consider that and all the other circumstances for the purpose of determining with what intent the money was converted."

This informed the jury that a mere conversion without fraudulent intent accompanying the act of conversion would not be sufficient to warrant conviction. The court further charged:

"The essential element in the crime charged is the felonious intent, and, before you can convict the defendant, you must find from the evidence in the case that he intended to convert to his own use, or to the use of some person other than the owner, the money, or some part of it, belonging to Helena Mizer and to cheat and defraud her. The felonious intent is an essential element of the crime of embezzlement, and must be shown by the prosecution beyond a reasonable doubt in order to convict the defendant."

The fact that no demand was made upon the defendant for the money before the prosecution was of no materiality. The defendant and his associate, Wagner, disarmed the vigilance of their principal by concealing the fact of payment and continuing to pay the interest periodically, and the fact that the

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money had come into their hands was not known until after the bankruptcy of the corporation, when demand would have been a meaningless ceremony. Taking the whole charge together, and in view of the fact that the testimony except as to felonious intent is without substantial dispute, we are unable to say that any error was committed in the trial prejudicial to the rights of the defendant.

By the Court.—The judgment of the circuit court is affirmed.

KISSINGER, Respondent, vs. ZIEGER, imp., Appellant. KISSINGER vs. ZIEGER, Respondent, and DAY, Appellant.

February 16—March 9, 1909.

(1, 2) *Judgment on warrant of attorney: Setting aside: Grounds: Defense to note: Intoxication.* (3–6) *Execution: Issuance to another county: Sale, when consummated: Sheriff's deed, when to be issued: Setting aside execution sale: Grounds: Reference to determine facts: Waiver.*

1. Where a note was merely given in renewal of a prior note which was unimpeached and founded upon a valuable consideration, the fact that the maker's signature to the renewal was procured while he was in a state of intoxication brought on by the payee's agent for that purpose is not a defense available upon a motion to set aside a judgment on the note entered upon warrant of attorney.
2. Courts exercise an equitable supervision over judgments entered upon warrants of attorney, and the party moving to set aside such judgment must show that he has been subjected to some injustice, it not being sufficient for him to aver mere technical errors or irregularities.
3. Under secs. 2969, 2971, Stats. (1898), where a judgment of the circuit court for one county is docketed in another county an execution to the sheriff of the latter county should be issued from the circuit court for the former county.
4. Although the purchaser at an execution sale of land pays the amount of his bid on the day of sale, yet the sale is not consummated until the certificate thereof is executed and delivered

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to the purchaser; and issuance of the sheriff's deed to the purchaser within fifteen months after the delivery of the certificate of sale is an irregularity.

5. Gross inadequacy of price and lack of actual notice or knowledge of the sale, together with some irregularity in the proceedings, are sufficient to warrant the court in setting aside a sale of land on execution.

6. When a question of fact arises upon the hearing of a motion, if a party does not request a reference (under subd. 3, sec. 2864, Stats. 1898) in order that evidence may be taken and witnesses examined, he waives that right, and the court may decide the question upon affidavits.

APPEALS from orders of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

For the plaintiff, *Kissinger,* there was a brief by *Butterfield & Rix,* and oral argument by *P. A. Rix.* They argued, among other things, that the court was right in refusing to vacate the judgment. The presumption is that the letter from plaintiff's attorneys was received by defendant. *Small v. Prentice,* 102 Wis. 256; *McDermott v. Jackson,* 97 Wis. 64; 16 Cyc. 1069, 1071. The proposed answer and the whole case made by the appellant is not meritorious, and there is no reasonable probability that the defense can be successfully established at a trial. *Kremer v. Sponholz,* 129 Wis. 549; *Phillips v. Portage T. Co.* 137 Wis. 189; *Deering H. Co. v. Johnson,* 108 Wis. 275, 280; *Roemer v. Schmidt,* 134 Wis. 1; *Reeves & Co. v. Kroll,* 133 Wis. 196; *Port Huron E. & T. Co. v. Clements,* 113 Wis. 249; *Marshall & Ilsley Bank v. Milwaukee W. Mills,* 84 Wis. 23.

For the defendant *Zieger* there were briefs by *Boden & Beuscher,* and oral argument by *F. X. Boden.* They contended, *inter alia,* that the court erred in refusing to set aside the judgment. 1 Daniel, Neg. Inst. § 214; *Wright v. Waller,* 127 Ala. 557, 54 L. R. A. 440; *Knott v. Tidyman,* 86 Wis. 164; *Kuelkamp v. Hidding,* 31 Wis. 503; *Getzlaff v. Seliger,* 43 Wis. 297; *Spafford v. Janesville,* 15 Wis. 474; *Ætna L. Ins. Co. v. McCormick,* 20 Wis. 265; *Stein v. Bene-*

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dict, 83 Wis. 603; *Sloane v. Anderson,* 57 Wis. 123, 131; sec. 2832, Stats. (1898); Moore, Facts, §§ 938–944, 1272. The application appealed to the equitable power of the court. *Reeves & Co. v. Kroll,* 133 Wis. 196; *Purcell v. Kleaver,* 98 Wis. 102, 73 N. W. 322. The sale was properly set aside for inadequacy of price. 17 Cyc. 1277; *Collins v. Smith,* 75 Wis. 392; *Meehan v. Blodgett,* 86 Wis. 511; 11 Am. & Eng. Ency. of Law (2d ed.) 650.

F. A. Geiger, for the impleaded defendant, *Day,* urged that the court was not justified in setting aside the sale for inadequacy of price, or upon any so-called "general equities." *Hill v. Hoover,* 5 Wis. 354, 375; *Phillips v. Hyland,* 102 Wis. 253; *Meehan v. Blodgett,* 86 Wis. 511; 17 Cyc. 1278; *Graffam v. Burgess,* 117 U. S. 180; 2 Freeman, Executions, § 309. The court should not in any event have determined this case upon the summary motion, nor upon affidavits. 2 Freeman, Executions, § 310; *Harrell v. Word,* 54 Ga. 649; *State Bank v. Noland,* 13 Ark. 299; *Jenkins v. Merriweather,* 109 Ill. 647; *McMinn's Legatees v. Phipps,* 3 Sneed, 196; *Anniston P. Works v. Williams,* 106 Ala. 324; *Hooper v. Smith,* 74 Wis. 530; *Warren v. Stinson,* 6 N. Dak. 293; *Day v. Graham,* 1 Gilm. 435, 445; *Evans v. Maury,* 112 Pa. St. 300; *Media T. & T. Co. v. Kelly,* 185 Pa. St. 131; *Lengert v. Chaninel,* 208 Pa. St. 229; *Groner v. Smith,* 49 Mo. 318.

TIMLIN, J. The defendant *Zieger* appeals from an order denying his motion to vacate a judgment entered upon cognovit in favor of the plaintiff and against *Zieger* and one Reingruber, while the impleaded defendant, *James B. Day,* a purchaser at execution sale under said judgment, appeals from an order setting aside the sheriff's sale and the sheriff's deed to *Mr. Day* thereon.

Taking up separately the appeal of *Zieger.* It appears that on May 11, 1906, the plaintiff *Kissinger* had judgment on cognovit in the circuit court for Milwaukee county against

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the defendants *Zieger* and Reingruber for $553.98. This judgment was also docketed in the circuit court for Washington county, and execution thereon from the circuit court for Washington county issued to the sheriff of that county on June 4, 1906. The defendants resided in Washington county, and the sheriff of that county called with the execution at the residence of *Zieger,* and, not finding the latter at home, made demand of payment from *Zieger's* wife, who was a weak-minded or insane person, and thereafter and on June 12, 1906, returned the execution wholly unsatisfied. Execution was also issued from the circuit court for Milwaukee county to the sheriff of Milwaukee county, who levied upon a house and lot in the city of Milwaukee, the property of *Zieger,* and on July 30, 1906, by virtue of said execution, sold the house and lot to *James B. Day.* Thereafter and on November 7, 1907, the sheriff of Milwaukee county pursuant to such sale executed and delivered a sheriff's deed to the purchaser, *Day.* On December 3, 1907, *Zieger* commenced proceedings to vacate the judgment, sheriff's sale, and deed upon affidavits and a proposed answer. It appeared by the affidavit of *Zieger* that his Milwaukee property so levied on and sold brought him an annual rental of over $300 and that he owned a homestead in Washington county, and that he had no knowledge that he had signed the judgment note until he received notice that *Day* claimed to own said property in the city of Milwaukee and made demand on his tenants to attorn to *Day.* He further averred that no demand was ever made upon him to pay this judgment note and that he had no prior knowledge of the entry of judgment thereon or the issue of execution; that *Day* was endeavoring to dispose of the property, asking $2,500 for it, and that the property was worth not less than $4,500; that there was collusion between *Day* and the plaintiff whereby notice was withheld from *Zieger.*

The proposed answer averred in substance that the indebtedness for which the note was given was that of Reingruber

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and that *Zieger* was an accommodation maker of the note, and that his signature to the note was procured while he was in a state of intoxication brought on by the agent of the plaintiff for that purpose, and that his intoxicated condition was such that he did not know what he was signing, and did not know at any time until November 26, 1907, that the note so signed was a judgment note. He denied that he had received any notice from plaintiff's attorneys or that any demand was made upon him for payment of the note.

The plaintiff showed in opposition that the note referred to in the answer was given on April 24, 1905, in renewal of a prior note of *Zieger* and Reingruber for $500, the consideration of which was money loaned by the plaintiff at the request of *Zieger* to Reingruber. One of plaintiff's attorneys presented an affidavit showing that the note in question was received for collection in the early part of May, 1906, and demand of payment was made from Reingruber and attempted to be made from *Zieger,* but the latter was not found at home, and that on May 21, 1906, a letter had been mailed by this attorney to *Zieger* notifying the latter that judgment had been entered upon the note. This letter was properly mailed and contained on the envelope a direction to return the letter to the writers if not called for within five days, and the same was never returned. The execution to the sheriff of Milwaukee county was not issued until after the Washington county execution was returned unsatisfied. On July 24, 1907, Reingruber was adjudged a bankrupt. It appeared that *Zieger* lived about one and a half miles from the postoffice at South Germantown, Wisconsin, and that all first-class mail received there addressed to *Zieger* is either delivered to him personally or forwarded by the next train after receipt thereof to *Zieger* at Rockfield, Wisconsin, a village about one and a half miles distant from *Zieger's* residence. The undersheriff of Milwaukee county presented an affidavit that during the time in question it was the custom of that office to notify the person

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upon whose property execution had been levied either by personal notice or by mailing a copy of the printed notice of sale to such person, and that to his best recollection he mailed such a copy to *Zieger* at the postoffice address given to him by the attorneys for the plaintiff, which was the proper address.

Upon the foregoing facts the circuit court properly refused to vacate the judgment. When the motion was submitted for decision to that court it appeared, as indicated in the foregoing statement of facts, that the alleged defense of *Zieger* with reference to his intoxicated condition at the time of signing the note in question and the procurement of such signature by plaintiff's agent would constitute no defense to the action available on this motion, because the note so procured was merely given in renewal of a prior note unimpeached and founded upon a valuable consideration. *Zieger* therefore showed no equity to have the judgment vacated, no matter what the facts were as to notice or knowledge of the entry of the judgment. *Matteson v. Ellsworth,* 33 Wis. 488; *Kremer v. Sponholz,* 129 Wis. 549, 109 N. W. 527. Courts exercise an equitable supervision over judgments entered upon warrants of attorney, and the party moving to set aside such judgment must show that he has been subjected to some injustice before the court will interfere. It is not sufficient for him to aver mere technical errors or irregularities. *Van Steenwyck v. Sackett,* 17 Wis. 645; *McIndoe v. Hazelton,* 19 Wis. 567; *Herfurth v. Biederstaedt,* 43 Wis. 633.

Considering the appeal from the order vacating the execution sale and sheriff's deed, it appears that that order was made by the circuit court upon the following grounds assigned:

"(1) By reason of the inadequacy of the price paid by *James B. Day.* (2) The general equities of the case. (3) The attempts made in Washington and Milwaukee counties to levy upon the personal property of the defendant *Zieger* (a) in his absence; (b) without making personal demand upon him for payment of the execution upon said judgment."

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It was also conditioned that the defendant *Zieger* pay to the purchaser, *Day,* the amount paid by the latter for the property, with interest at six per cent. from the date of purchase, and the sum of $25 attorney fees, and any further sum paid by said purchaser for insurance, taxes, and sheriff's deed. Upon the cognovit judgment described, execution was issued to the sheriff of Washington county from the circuit court for Washington county. This was an irregularity. The execution should have been issued from the circuit court for Milwaukee county, where the judgment roll lay, to the sheriff of Washington county. Secs. 2969, 2971, Stats. (1898). These two executions might have been issued at the same time. Id. But they were not so issued. Upon the execution issued to the sheriff of Milwaukee county, the real property of *Zieger* in the latter county was sold to *James B. Day* of Hartford, Washington county, on July 30, 1906, for $611.52. Fifteen months and eight days after this date a sheriff's deed was executed to the purchaser, *Day.* There was evidence before the court which was entitled to credence that the value of the property was $4,000. The affidavit of the defendant *Zieger* to the effect that he had no notice or knowledge of this sale prior to November 27, 1907, was before the court, and it was for that court to determine the question of credibility. There was also the fact sworn to by defendant *Zieger* that he did not know that the note he had signed was a judgment note, and this statement is rendered probable by the appearance of the note, in which the power of attorney to confess judgment is contained in four lines of small print following the body of the note, and the whole instrument is signed at the bottom, the same signature answering for signature to the note and signature to the power of attorney. There was the attempt to collect by execution in Washington county from Reingruber, the principal debtor, the visit to *Zieger's* house in his absence, and the hasty return of the Washington execution without actual notice to or demand upon *Zieger.* There was also the possibility that the letter from plaintiff's attorneys to *Zieger* had

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miscarried on account of sending some of *Zieger's* mail to Rockfield, and there was the failure to trace any other direct notice to *Zieger,* together with a lack of definite or satisfactory explanation of how *Day,* a neighbor of *Zieger,* or at least one residing in his county, came to know of and bid on this sale in Milwaukee county. There was also no apparent motive on the part of *Zieger* to remain idle and allow his property to be sacrificed for this comparatively small sum.

There were also these irregularities existing, but not noticed by counsel: In the sheriff's return to the execution he certifies that on June 16, 1906, he advertised the property for sale to take place on the 30th of July, 1906, by posting a printed notice thereof in three public places in the ward in which the property was situated, and by posting a printed notice thereof in three public places in the Seventh ward of the city of Milwaukee more than six weeks prior to said sale, and that he caused a like notice to be publicly advertised for six weeks successively by causing a copy of such notice to be printed once in each week during the six weeks immediately preceding said sale in the Milwaukee Sentinel, a public newspaper, etc., the first publication being on June 16, 1906, and he refers to a copy of the notice with the printer's affidavit of publication annexed.

It is only by inference from the words "like notice" that we can gather that the posted notices specified the hour of sale. Again, the return on the last execution shows that duplicate certificates of this sale were made and delivered on August 9, 1906. No other proof of the form, contents, or date of these certificates of sheriff's sale was before the court. An affidavit showed that *Day* paid the amount of his bid on the day of sale, but the sale was not consummated until this certificate of sale was executed and delivered to the purchaser. *Briscoe v. York,* 53 Ill. 484. The deed was issued to the purchaser within fifteen months from August 9, 1906. This was an irregularity.

A line of precedents on this subject is that represented by

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Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512. These are to the effect that gross inadequacy of price, lack of actual notice or knowledge of the sale, conjoined with some irregularity in the proceedings, are sufficient to warrant the court in setting aside the sale. This has been the course of decision in our state. *Grede v. Dannenfelser,* 42 Wis. 78; *Collins v. Smith,* 75 Wis. 392, 44 N. W. 510; *Phillips v. Hyland,* 102 Wis. 253, 78 N. W. 431.

We think this is a case where gross inadequacy of price, lack of actual notice or knowledge of the sale, and some irregularities conjoin to uphold the decision of the court below. A point is made that the circuit court should not have proceeded to set aside this sale and sheriff's deed upon affidavits and order to show cause, but should have required the plaintiff to bring an action. Our statute provides that in the case of a question of fact arising upon such hearing the question may be referred, which means that evidence may be taken and witnesses examined. Subd. 3, sec. 2864, Stats. (1898). No request was made to have this done; consequently that right on the part of the appellant was waived. As a consequence we think there was no error prejudicial to the appellant *Day* in this proceeding.

By the Court.—The orders of the circuit court are affirmed upon both appeals, with costs in favor of the respondent *Kissinger* against the appellant *Zieger,* and in favor of the respondent *Zieger* and against the appellant *Day.*

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SANITAS COMPANY, Appellant, vs. NIEZORAWSKI, Respondent.

February 16—March 9, 1909.

Foreign corporations: Doing business in this state: Pleading: Findings of fact: Interstate commerce: Sales: Liability of agent's surety.

1. In an action upon an agent's bond, where the answer denied the corporate existence of plaintiff and alleged that it held itself out to be a foreign corporation, a further allegation that it had transacted business in this state under the contract in question in violation of sec. 1770*b*, Stats. (1898), did not show that the contract was void, since said section does not apply to cases of mere representation.
2. Defendant might, however, prevail upon the defense so attempted to be pleaded, where the court found as a fact that plaintiff was a foreign corporation, and such finding was not excepted to.
3. Where goods are sold outright by a foreign corporation to a so-called agent in this state the transaction is interstate commerce, not affected by sec. 1770*b*, Stats. (1898), but as to any indebtedness of the purchaser on such sales there is no liability on the part of the surety on a bond conditioned that such purchaser should "well and truly perform the duties of agent" for the foreign corporation, and pay over to it all moneys received by him "as such agent."

APPEAL from a judgment of the circuit court for Milwaukee county: OREEN T. WILLIAMS, Circuit Judge. *Affirmed.*

One Peter J. Ternes as principal, and the defendant *Niezorawski* as surety, executed a bond to the plaintiff in the penal sum of $200. The condition of the bond was to the effect that if Ternes, his heirs or personal representatives, should "well and truly perform the duties of agent for the said *Sanitas Company,* and pay over on demand all moneys received by" him "as such agent to said *Sanitas Company,* all without delay or fraud," the obligation should be void, "otherwise to be and remain in full force."

The complaint alleged that said Ternes collected for the account and use of the plaintiff, for merchandise delivered by the plaintiff to him, the sum of $1,249.88, and that said

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Ternes paid plaintiff on such account $1,077.38, which, with other credits to which Ternes was entitled, left a balance due of $72.50, for which judgment is demanded. The plaintiff further alleged that said Ternes died prior to the commencement of the action, leaving no estate of any kind or description, and that plaintiff was a foreign corporation organized under the laws of Great Britain.

The answer denied the corporate existence of the plaintiff, admitted the execution of the bond and that Ternes had been agent for the plaintiff, transacting business in Wisconsin, and that he was dead. The answer then alleged that at the time of the execution of the bond sued upon plaintiff held itself out as a foreign corporation organized and existing under the laws of the Kingdom of Great Britain and has ever since held itself out to be such; that its principal places of business were then and now are the cities of London and New York; that it was never organized under the laws of Wisconsin; that it had never caused to be filed in the office of the secretary of state of Wisconsin a duly authenticated copy, or any copy, of its charter or articles of incorporation; that said contract affected the personal liability of plaintiff and related to property within the state of Wisconsin; that plaintiff had transacted business under said contract with the said Ternes for a number of years; and that plaintiff was not organized as a corporation for purposes which exempted it from filing a certified copy of its articles with the secretary of state.

The court found that the surety contract involved in the action was made, executed, and delivered in the state of Wisconsin by the defendant and the plaintiff, and that the plaintiff, at the times mentioned in the complaint, transacted business in the state of Wisconsin and had property within said state, and that it failed to comply with the requirements of sec. 1770*b*, Stats. (1898). As a conclusion of law the court found that the surety contract was void and that the complaint should be dismissed.

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The only material evidence offered in behalf of the plaintiff was to the effect that between July 5, 1899, and August 29, 1904, the plaintiff sold to said Ternes disinfectants to the amount of $1,249.88 and that there was a balance due and owing on said account, over and above payments and credits, amounting to $72.50. The material evidence offered in defendant's behalf was given by the son of the deceased Ternes, and was to the effect that plaintiff shipped goods to his father, that they were delivered at his house in barrels, and that it was his practice to sell the contents of the barrels in small lots, although in the case of a couple of large consumers the goods were shipped directly to them.

The plaintiff appeals from the judgment dismissing the complaint, and assigns as error the ruling of the court to the effect that plaintiff was not entitled to recover under sec. 1770*b*, Stats. (1898).

Harry M. Silber, for the appellant.

Casimir Gonski, for the respondent.

BARNES, J. The cause of action against the defendant surety, as stated in the complaint, is based upon the refusal of Ternes to pay over to the plaintiff moneys collected by him as agent. The allegations of the complaint fairly show liability on the part of the defendant because of a breach of the conditions of the bond sued on. To such cause of action the defense was attempted to be interposed that plaintiff transacted business in this state in violation of sec. 1770*b*, Stats. (1898), and therefore could not recover. The defense was not well pleaded, because the answer denied an allegation of the complaint setting forth that the plaintiff was a foreign corporation, and simply alleged that plaintiff held itself out to be such a corporation. Sec. 1770*b* does not reach cases of mere representation. The court found that plaintiff was a foreign corporation, and the finding was not excepted to, so the unaccountable denial of the answer does not preclude defendant

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from prevailing on the defense attempted to be pleaded. There was evidence offered which was ample to show that, if the defendant was in fact acting as the agent of the plaintiff, it was transacting business in violation of sec. 1770*b*.

The answer expressly admitted that Ternes was acting as the agent of the plaintiff and did not deny the existence of the indebtedness. Hence there was no necessity for proof on either subject. The plaintiff, desiring no doubt to obviate the defense attempted to be interposed, offered proof tending to show the amount of the balance due, and also tending to show that the relation of debtor and creditor existed between it and Ternes, instead of that of principal and agent. This evidence was received without objection. It showed plainly enough that Ternes, instead of handling the goods shipped him by plaintiff as its agent, purchased such goods outright. If this were true, the business transacted between the parties was interstate commerce pure and simple and there was no violation of sec. 1770*b* by plaintiff. The bond, however, on which suit was brought restricted the liability of the defendant to obligations incurred by Ternes as agent, and did not cover indebtedness such as was proved to exist by the evidence given on the trial.

The circuit court disposed of the case upon the theory that sec. 1770*b* had been violated; but, whichever view is taken, the judgment is correct and therefore should be affirmed.

By the Court.—Judgment affirmed.

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ROSENBERG, Appellant, vs. MCKINNEY, Respondent.

February 16—March 9, 1909

Sales: Fraud: Election to affirm: Conversion of personalty: Evidence: Appeal: Direction of judgment below.

1. Where the purchaser of corporate stock, after discovery of a fraud whereby he was induced to make the contract of purchase, elects to receive the benefits of the contract instead of to rescind it, he is liable, notwithstanding the fraud, for the agreed purchase price.
2. Defendant's affirmance, after full knowledge of all the facts, of his contract to purchase certain corporate stock is *held* in this case to be so conclusively established by his own evidence that on reversal of a judgment entered upon a verdict in his favor the supreme court does not order a new trial, but directs judgment in favor of the plaintiff.
3. A verdict to the effect that plaintiff had wrongfully converted to his own use corporate stock delivered to him by defendant is *held* to be sustained, although there was conflict and confusion in the evidence as to the agreement under which it was delivered and as to plaintiff's refusal to return it.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Reversed.*

Plaintiff sued on a note dated May 24, 1905, due in 120 days, for $1,000, which was duly indorsed to him and of which he claimed to be an innocent holder for value in due course. Defendant set up that the note was given for certain mining stock of the Standard Lead & Zinc Smelting & Mining Company, for which he was induced to pay $1,000 in money and to give his four $1,000 notes by fraudulent representations of one Davidor, an officer of the company. The answer also set up by way of counterclaim that the plaintiff was indebted to him for certain 10,000 shares of the stock so purchased which had been delivered by defendant to plaintiff and retained and converted by the latter. The jury rendered a verdict for defendant on the plaintiff's cause of action, and also for the defendant upon his counterclaim for the sum of

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$750 and interest, from judgment upon which verdict the plaintiff appeals.

C. H. Hamilton, for the appellant.

For the respondent there was a brief by *Boden & Beuscher,* and oral argument by *F. X. Boden.*

DODGE, J. 1. The trial and record in this case were confused and amplified by a tremendous amount of utterly irrelevant testimony and evidence, much of it so inadmissible that it was an abuse to occupy the court therewith; but, almost incidentally, a small amount of undisputed evidence, mainly from the defendant himself, appears in the record which we deem wholly conclusive of the rights of the parties upon the cause of action presented by the complaint. The cause of action is on a note given for part of the purchase price of a quantity of capital stock. The defense thereto is fraud on the part of the taker of the note in stating to the maker "that there was no promotion stock in the company, that defendant should be elected a director, and that all the other directors had paid for stock which they held." This is pleaded as a defense and as a reason why defendant should be relieved from his contract to pay for the stock. It is tantamount, of course, to rescission. If it be conceded that the statements were false, were originally relied on, and might constitute actionable fraud, the defendant, when he discovered the falsity, doubtless had a right of election to promptly rescind and demand release from his promise to pay; but he equally had the option to retain that which he had received, thereby affirming the contract with the accompanying right to recover such damage as he had suffered by reason of the fraud. It is established most conclusively by defendant's own evidence that the falsity of any of these statements which might have constituted fraud became fully known to him very shortly after the purchase of the stock. He was immediately elected a director. He joined in a confederacy to place the stock of himself and the other directors in the hands of an escrow to hold

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the same out of the market in order to facilitate jobbing its price. He had full access to the books, participated actively in the examination of the property which the corporation had received as a consideration for the issue of this stock, learned of the terms under which one half of the stock of the corporation had been issued to the seven directors, including himself; so that, if it met the definition "promotion stock," he knew of the fact, and he himself testified that he learned as early as July, after the purchase, that the whole scheme was a fraudulent conspiracy. Meanwhile he continued to hold all rights gained by the purchase. He availed himself of the opportunity as a member of what he describes as a fraudulent conspiracy to manipulate and deal in what small amount of the stock of the corporation had reached the general market, buying and selling the same in association with Davidor in anticipation of the effect on its price to be accomplished by manipulation by the conspirators of the other stock of the company. In September, knowing that the plaintiff had acquired ownership of this note, he employed or requested him to secure a consent by the other directors that the certificate for his stock be released from escrow so as to place it within his own control, and in consideration of their consent thereto and his receipt of the certificate he executed the following instrument:

"In consideration of the release from escrow of certificate No. 129 in Standard Lead & Zinc Smelting & Mining Company for 61,428 shares, I agree to forthwith deliver to said company a certain contract for the acquisition by me of 71,428 shares of said stock, and to accept said 61,428 and 10,000 shares heretofore delivered, in full satisfaction of said contract, and also to deliver duplicate escrow agreement in my possession. And I further agree that said stock is received by me in full satisfaction of the payment by me of $5,000 heretofore made by me for said stock."

From these facts, which are undisputed, no conclusion is possible but that in September the defendant with full knowledge elected to receive the benefits of his contract instead of

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to rescind it. He himself testifies that the stock was salable at that time on the market for three or four times as much as he paid for it, so that his motive to so elect was obvious. Indeed, the very counterclaim upon which defendant recovered in this action is predicated upon his ownership of 10,000 shares of said stock, which ownership results alone from the existence of the contract, his part of which was to pay this note with others. The denial of the validity of the note sued on is wholly inconsistent with such action. *Van Trott v. Wiese,* 36 Wis. 439; *Herman v. Gray,* 79 Wis. 182, 48 N. W. 113; *Peerless R. Co. v. Conway,* 79 Wis. 622, 48 N. W. 854; *Palmer v. Banfield,* 86 Wis. 441, 56 N. W. 1090; *Smeesters v. Schroeder,* 123 Wis. 116, 101 N. W. 363; *Davis v. Schmidt,* 126 Wis. 461, 106 N. W. 119; *Fox v. Wilkinson,* 133 Wis. 337, 342, 113 N. W. 669. He has elected to affirm the contract by taking the benefits under it, and must therefore perform his part of it; *i. e.* pay the agreed purchase price.

2. Upon the question of the counterclaim there is no dispute that the plaintiff received from the defendant a certificate for 10,000 shares of the latter's stock. The plaintiff says he received it in payment for his services in obtaining at defendant's request release of the rest of his stock from deposit in escrow. Defendant denies the making of any such agreement and asserts with equal positiveness that he delivered it to plaintiff to procure retransfer in smaller amounts convenient for sale in the market. Thus, while plaintiff is in some measure corroborated, there was a sufficient conflict of evidence to support a verdict either way upon the terms of the contract accompanying the delivery of the stock to the plaintiff. His refusal to return it to defendant is also supported by some evidence, although involved in some measure of confusion. We therefore are unable to convince ourselves that we could be justified in reviewing the action of the jury upon this subject. We find none of the other assignments of error

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in any wise relevant to this cause of action, and therefore conclude that the verdict on the counterclaim must stand.

The defendant's affirmance of his contract to take and pay for the 71,428 shares of stock after full knowledge of all of the facts is so conclusively established by his own evidence that we cannot think that a new trial can be in any wise necessary or proper within the meaning of sec. 3071, Stats. (1898). That could not be overcome except by testimony in defiance of defendant's own statements and admissions. It would but open the door to perjury to submit the controversy to trial again. *Hay v. Baraboo,* 127 Wis. 1, 105 N. W. 654. We think that justice requires that this controversy be terminated, and that judgment be entered in accordance with the finding of the jury on defendant's counterclaim and with the undisputed facts upon the plaintiff's cause of action.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of the plaintiff, as of July 8, 1907, for $264.58, together with costs.

GOETSCH, Appellant, vs. INTERNATIONAL HARVESTER COMPANY, Respondent

February 17—March 9, 1909.

Master and servant: Personal injury: Instruction as to operation of machine: Contributory negligence: Direction of verdict.

In an action for injuries to an employee who, while operating a boring machine, was struck by a rapidly revolving hand crank which he had permitted to remain upon the crank shaft when he applied the power, direction of a verdict for the defendant is *held* to have been proper, it being established beyond dispute by the evidence that plaintiff had been properly instructed and knew that the shaft revolved when the power was applied and that the danger from the revolving crank was obvious.

KERWIN, J., dissents.

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APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This action was brought to recover damages for personal injuries received by plaintiff while in the employ of the defendant working at a boring machine. The negligence alleged was failure to instruct and incompetency of the instructor. The answer denied the material allegations of the complaint. After the evidence was in, the court directed a verdict for defendant and judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Ernst von Briesen* and *James A. Sheridan,* and oral argument by *Mr. Sheridan.*

For the respondent there was a brief by *Charles A. Vilas,* attorney, and *Robert N. McMynn,* of counsel, and oral argument by *Mr. McMynn.*

KERWIN, J. It is insisted by plaintiff that the defendant was negligent in failing to instruct the plaintiff and in furnishing an incompetent instructor, and that the plaintiff did not know or appreciate the danger, and that these questions were questions for the jury; while on the part of the defendant it is insisted that the evidence showed as matter of law that there was no negligence on the part of the defendant, but that the plaintiff was guilty of negligence which proximately caused his injury.

It seems to be conceded that the description of the machine in question set out in the plaintiff's complaint is substantially correct. This machine consisted of a deep box bed of iron four feet wide, nine feet long, and about two feet six inches high, which box contained a shaft and bevel gear and supported a table upon which was placed the iron to be bored. On each end of the machine is an iron framework, one for the support of an adjustable spindle head which works the cutting bar, which spindle head is adjusted either by power or by hand, and on the left end of the box bed is a lever with a

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spring clutch used in adjusting the spindle head. The lever bar or spring clutch is connected with the machinery in the interior of the box and is used in elevating or lowering the spindle head by power. This lever is shifted from the center hole to the one above when elevating the spindle head, and to the hole below when lowering it, the spring clutch dropping into either hole as required. On the left end and in front of the box bed and one and a half feet from the base line of said box is the end of a shaft which carries a hand crank about thirteen inches in length, which when on the shaft extends out about six inches. This shaft is connected with the machinery used for elevating and lowering the spindle head. The crank is used upon this shaft when slight adjustments of the cutting bar are made. The shaft is so adjusted to the machinery on the inside of the box that it is disconnected when the clutch is in the center hole and revolves very rapidly when it is in the upper or lower hole and the power applied. The plaintiff had been at work on this machine about two and one-half days. In doing the work of applying the power to elevate or lower the cutting bar it was necessary to stand in front of the crank shaft. Immediately above the crank shaft was a lever used to start the machine when elevating the cutting bar. At the time of the injury, plaintiff, in applying the power for the purpose of raising the cutting bar, was in such position that the crank, being upon the shaft when the power was applied, revolved with great rapidity and struck him, causing the injury complained of; so it appears that the injury was caused by permitting the crank to remain upon the shaft while plaintiff was adjusting the cutting bar. The operation of raising and lowering the cutting bar was for the purpose of removing the finished piece and placing another in the machine to be bored or milled. When plaintiff began his work defendant furnished one Janzen to instruct him, and Janzen spent several hours showing plaintiff how to operate the machine, and went through the process of putting in, fin-

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ishing, and taking out at least two pieces of casting which involved the entire operation necessary. Janzen testified that he instructed plaintiff that the crank must be taken off and laid aside when not in use, and that he did so in giving him instructions. Plaintiff was thirty-five years of age, a boxmaker by trade, a man of at least average intelligence, had worked some on a farm, and also on a lathe for a street car company.

Respecting the incompetency of the instructor, Janzen, little need be said. While it is true he was not very familiar with the details of the machine, it is also clear from the evidence that he was perfectly familiar with its operation so far as such operation had any connection with the injury in question. The only complaint of failure to instruct is with reference to the removal of the crank or warning to the plaintiff that it was dangerous or would revolve rapidly when the power was applied to raise or lower the cutting bar. The position of the plaintiff when operating was directly in front of the crank shaft, and, while he denies he was instructed to take it off or was informed that it was dangerous to leave it on while the power was being applied, he admits that he did take it off every time he operated the machine before the time of injury, but claims he did so because it was in his way and not because he knew it was dangerous to leave it on. He testified that he finished ten or eleven jobs before the injury; that the crank stood out about six or eight inches; that he did not take it off the last time because he did not see it; that it must have hung down. It also appears from the evidence that when he was operating under the instruction of Janzen he took off the crank. The plaintiff testified:

"I watched Janzen as much as I could when he showed me how to work the machine, and did just as he showed me, and each time that I did a piece of work after the first two I did it in the way Janzen had shown me. I took off the crank each time because it was in the way—stood out. It was handier for the operator who worked at the machine to go around the machine. It stood out about six or eight inches. I noticed from the beginning that it was in the way. I took off

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the crank every time until the last time. I did not take it off the last time because I did not see it. It must have hung down that I did not see it. The ten or eleven different jobs that I did were all bored alike. I don't know whether they were the same, but I bored them all alike, and they were put on just the same as the one Janzen first showed me."

He admitted that after the injury he said, "Why didn't I take off that crank?" There is also evidence that he stated after the injury that he got hurt because he forgot to take off the crank. He does not deny this, but says that he does not remember whether he made such statement or not. On the other hand, he denies that anybody ever told him to take off the crank, or that he ever saw Janzen or any one else take it off, or that he knew the crank shaft revolved when the power was applied.

It appears from the evidence that during the forenoon, or the greater part of it, while Janzen was instructing him, all the movements necessary in operating the machine were gone through with in the presence of the plaintiff, and at least two or three castings completed, after which plaintiff admitted he understood the operation of the machine. In view of the fact that the crank and shaft were in plain view and operated while plaintiff was receiving instructions, and his own testimony with reference to taking off the crank at all times prior to the time of injury, and his statement that in managing and operating the machine he strictly followed the instructions of Janzen, it is considered by the court that it is established beyond practical dispute that plaintiff was instructed as testified to by Janzen, and knew the crank shaft revolved when the power was applied but forgot to remove the crank. Upon the evidence, the principal material part of which has been heretofore referred to, the court is of the opinion that the court below was right in directing a verdict for defendant, and, especially in view of the deference due to the lower court upon the subject, its ruling in that regard should not be disturbed.

The main argument of counsel for appellant is that plaint-

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iff was not warned of the particular danger, and that although it be admitted that he was instructed to take off the crank when applying the power to raise or lower the bar, still he ought to have been warned of the danger of not taking off the crank, namely, that the crank shaft would revolve with great rapidity when the power was applied to raise or lower the bar. If plaintiff knew, or in the exercise of ordinary care should have known, that the crank shaft would revolve rapidly when the power was applied, then it seems clear that he was apprised of the danger, because the danger of being struck by the rapidly revolving crank when he was in close proximity to it in operating the lever was perfectly apparent, and no further instruction in that regard was necessary.

In the foregoing opinion I have endeavored to state the views of the court. My individual opinion is that the case should have been sent to the jury on the questions of sufficiency of instructions, failure to warn, and contributory negligence of plaintiff.

By the Court.—The judgment of the court below is affirmed.

ELLINGER, Appellant, vs. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Respondent.

February 17—March 9, 1909.

Discovery: Examination of adverse party before issue joined: Discretion: Unnecessary examination: Life insurance: Apportionment of surplus, etc., to semi-tontine policy: Pleading.

1. **If a party is entitled to the examination authorized by sec. 4096, Stats. (Supp. 1906), to enable him to plead, it should be allowed without reference to his ulterior motives, his good faith or bad faith; the court having ample power to protect the opposite party against unnecessary or improper examination.**
2. **The affidavit of the party seeking such examination is not conclusive upon the trial court as to the matters necessary to en-**

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able him to plead; and such court may in its discretion limit the subjects to which the examination shall extend or may forbid the examination entirely, and its decision will not be disturbed unless there was an abuse of discretion.

3. In an action to recover the amount due on a matured semi-tontine life insurance policy, including the surplus or profits which should equitably be apportioned thereto, plaintiff sought to examine defendant's actuary, under sec. 4096, Stats. (Supp. 1906), in order to enable plaintiff to plead. It appearing from plaintiff's affidavit that he had had inspection of defendant's books showing the whole number of such policies issued, the amount and items thereof, the total premiums, the forfeitures by lapse, and the total payments of expenses and benefits, it is *held* that the proposed examination is unnecessary, since plaintiff has sufficient information to enable him to frame his complaint, claiming a specific sum.

4. The plaintiff in such case may, if he so elect, plead by claiming an indeterminate or indefinite sum approximating a stated amount, and cast the burden upon the defendant to account for the surplus and profits promised by the contract of insurance.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The appeal is from an order staying and restraining a proceeding by the plaintiff to examine the defendant's actuary before issue joined, under sec. 4096, Stats. (1898), as amended by ch. 29, Laws of 1899, and ch. 244, Laws of 1901.

For the appellant there was a brief by *Kronshage, McGovern, Goff, Fritz & Hannan,* attorneys, and *Arthur F. Belitz,* of counsel, and oral argument by *Theodore Kronshage.*

Among other references upon the part of the appellant were the following: Sec. 4183, Stats. (1898); *Schmidt v. Menasha W. W. Co.* 92 Wis. 529, 66 N. W. 695; *State v. Baetz,* 86 Wis. 29, 56 N. W. 329; *Williams M. & R. Co. v. Raynor,* 38 Wis. 132; *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456; sec. 4186, Stats. (1898); *Winner v. Bauman,* 28 Wis. 563; *Nichols v. McGeoch,* 78 Wis. 360, 47 N. W. 372; *Richards v. Allis,* 82 Wis. 509, 52 N. W. 593.

For the respondent there was a brief by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *C. F. Fawsett.*

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TIMLIN, J. This cause was before the court in 125 Wis. 643, 104 N. W. 811, where, in a proceeding by the plaintiff under sec. 4183, Stats. (1898), to obtain inspection and copies of books, papers, and documents, the defendant was allowed to examine the plaintiff under sec. 4096, Stats. (1898), as amended by ch. 39, Laws of 1899, and ch. 244, Laws of 1901. Again in 132 Wis. 259, 111 N. W. 567, where the plaintiff was permitted to proceed to obtain an inspection and copies. Having procured such inspection and copies, the plaintiff sought to examine the defendant's actuary by oral examination under sec. 4096, Stats. (1898), in order to enable the plaintiff to plead. The circuit court, as stated, restrained and in effect forbade this examination by the order appealed from. This order was made upon the affidavit made and served with the notice of the proposed examination required by sec. 4096, Stats. (1898), and other affidavits in aid and opposed and recited in the order. It is claimed on the part of the respondent that these affidavits and papers taken together show that the proposed examination was not applied for in good faith and was merely vexatious, but we do not find it necessary to pass on that question. All lawsuits are somewhat vexatious, and we do not approve of the practice of injecting a claim or issue of this kind into the special proceedings and thus multiplying the issues. If the plaintiff is entitled to the examination to enable him to plead, it should be allowed without reference to his ulterior motives, his good faith or bad faith. Sec. 4096, Stats. (1898), as construed by this court, affords ample protection against unnecessary or improper examination without recourse to such recrimination.

In *Badger B. Mfg. Co. v. Daly,* 137 Wis. 601, 119 N. W. 328, it was decided that the statement in the affidavit of the party seeking examination that the matters sought to be disclosed are necessary to enable him to plead is not conclusive upon the circuit court, and that that court may in its discretion limit the examination so as to exclude even relevant matter if such matter does not appear to be necessary to enable

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the party to plead, or if for any other reason recognized by law it would be improper for the plaintiff at that stage in the action to proceed with the examination. In the case last cited the order forbade any part of the proposed examination, and under the authority of that case the order in the instant case cannot be reversed unless there appears to have been an abuse of discretion on the part of the circuit court.

From the affidavit of the plaintiff made for the purpose of procuring the examination in question it appeared that he held a twenty-year semi-tontine life insurance policy in the defendant company dated March 11, 1884, which matured March 10, 1904, a copy of which was annexed to the affidavit. To induce the plaintiff to enter into said contract the defendant made certain false and fraudulent representations with reference to the amount which plaintiff would receive at the end of the tontine period. This amount the defendant refused to pay at the end of said period, and instead offered an amount of $9,122.70, which is less than the plaintiff is justly entitled to. The tontine dividend period for the policy as stipulated therein was to expire March 10, 1904. No dividend was to be allowed or paid on the policy unless the assured survived the tontine period and the policy was then in force; and, further:

"That all surplus or profits derived from such policies on the semi-tontine plan as shall not be in force at the date of the completion of their respective tontine dividend periods shall be apportioned equitably among such policies as shall complete their tontine dividend periods."

This is quite vague, and from its words alone it would be quite difficult to say whether the surplus or profits from all semi-tontine policies outstanding on March 11, 1884, and thereafter written up to March 9, 1904, and not in force March 10, 1904, should be applied on this policy, or whether the semi-tontine policies therein referred to were only those of a class having the same tontine period, or a class maturing at some date or between some dates not specified, or it might

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refer to policies of this kind written at a date or between some dates not specified. The amount of surplus or profit to be apportioned in any case would be a matter particularly within the knowledge of the defendant and not within the knowledge of the plaintiff. But in his affidavit made for the purpose of obtaining the examination the plaintiff discloses: (1) That he has had inspection of the books of the defendant. (2) That defendant began writing these semi-tontine policies in 1882 and discontinued writing them in 1899, and that their tontine periods were ten, fifteen, and twenty years. (3) These policies were upon defendant's books separated into three classes corresponding to the tontine periods mentioned, and further classified with reference to their year of issue. (4) This was kept up on said books until shortly before 1892, the time of maturity of the earliest policies of the ten-year class, when the mode of bookkeeping was changed, and the accumulation summaries of all classes of policies were merged and consolidated upon the books and the defendant estimated or assumed an hypothetical amount of surplus and profits, out of which and according to which settlements were made and surplus and profits paid upon maturing semi-tontine policies. (5) These books do not disclose to plaintiff facts or information sufficient to determine whether this is an equitable apportionment of the surplus or profits and so enable him to frame his complaint.

Right here we must differ with appellant. If this does not furnish him sufficient information to enable him to plead, it is hard to say what would do so. There is no suggestion that the books are false or forged. He has the written contract, the whole number of policies issued, the amount thereof, the items making up this, the total premiums, the forfeitures by lapse, and the total payments of expenses and benefits. That the items are numerous or the totals vast can make no difference where the data are present, the system is apparent, and the work of footing is done. Whether or not the mode of

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computation of surplus and profits based on these data and employed by defendant is wrong is a question arising upon the merits, but not necessary to enable the plaintiff to plead. It involves the whole merits of the controversy, and these questions are not before the court at this stage of the litigation.

To the foregoing averments the plaintiff adds in his affidavit:

"That notwithstanding the defendant in the year 1892 and from year to year thereafter continued to compute reserve values and to apportion surplus and profits on the merger basis and hypothetical or estimated fund adopted in 1892, it continued to enter and carry in its original records separate accounts and data for each class and year of said semi-tontine policies in the same manner as it had done at all times prior to the year 1892."

The object in presenting this is not apparent. Its effect would be to enable appellant to make a computation of the amount due upon his policy upon various bases of computation, or to show that the defendant placed a certain construction upon this policy. Other averments in the affidavit need not be mentioned, but we may say in passing that all entries, charges, expenses, or payments appearing upon said books which the plaintiff knows or believes to be mistaken or wrong may be rejected by him in making his claim in the complaint. Hence the presence of such averments as these in the affidavit does not strengthen it. We must hold that, upon the face of the affidavit presented by the plaintiff, he shows that he has possession of all the data necessary for him to plead, claiming a specific sum in his complaint. On the other hand, the nature of the contract of insurance disclosed by the affidavit is such that the plaintiff may, if he so elect, plead by claiming an indeterminate or indefinite sum approximating a stated amount and cast the burden upon the defendant to account for the surplus and profits promised by the contract of insurance. *North Side L. & B. Soc. v. Nakielski,* 127 Wis. 539,

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544, 106 N. W. 1097; *Somervaill v. McDermott,* 116 Wis. 504, 93 N. W. 553; *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704; *Schwickerath v. Lohen,* 48 Wis. 599, 4 N. W. 805; *Joy v. Walker,* 29 Vt. 257.

The conclusion of the affiant to the effect that the information sought is necessary to enable him to make his complaint is not binding upon the circuit court, and in this case we think it is affirmatively shown that the examination sought is not necessary to enable the plaintiff to frame a complaint, but goes to the detail evidence perhaps relevant upon a trial for the purpose of impeaching the adjustment of surplus and profits to this policy made by the defendant, if perchance defendant should answer as apparently anticipated by the plaintiff.

Upon the authority of *Badger B. Mfg. Co. v. Daly,* 137 Wis. 601, 119 N. W. 328, the order appealed from must be affirmed.

By the Court.—The order of the circuit court is affirmed.

PIOTROWSKI, Appellant, vs. CZERWINSKI and others, Respondents.

February 17—March 9, 1909.

Setoff: Equitable counterclaim against claim of nonresident insolvent.

1. A court of equity will permit an equitable setoff when justice requires it, even in a case not coming within the statute of setoffs.
2. In an action upon promissory notes, of which the plaintiff was not a *bona fide* holder, it appeared that the payee, who was the real party in interest, was a nonresident, was insolvent, and was indebted to the several defendants, residents of this state, in sums exceeding the amount of the notes sued on, and that if they could not set off such debts due from him they must lose them altogether. *Held,* that the court properly allowed such debts to be set off as equitable counterclaims in the action.

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[3. Whether, the indebtedness of defendants on the notes being joint, and the indebtedness of the payee being to them severally, the latter would constitute legal counterclaims, is not determined.]

4. Any one of the defendants in such case might set off his entire claim against that of the plaintiff in order to reduce the amount he might be called upon to pay upon an execution.

5. The offsetting of such claims would bar defendants from thereafter maintaining an action against the payee of the notes in suit upon the claim so offset.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The court found that on October 4, 1904, the defendants executed and delivered to Ignatz Kowalski their promissory note for $275, which became due January 2, 1905, and that on the same date they executed another note for a like sum, which became due March 2, 1905, and that the consideration for which said notes were given to said Kowalski was an indebtedness due him from the Polish Publishing Company, a corporation in which the defendants were interested, and that said defendants were not jointly indebted to said Kowalski at the time said notes were given; that at the time the notes were executed all of the parties resided at Milwaukee, Wisconsin, but that about a month thereafter said Kowalski removed to the city of Chicago, and ever since has been and still is a resident of the state of Illinois; that the plaintiff is an attorney at law residing in Chicago, and that he purchased the note first maturing after it became due, and purchased the second of said notes before the same became due, but took the same with full knowledge and notice of all equities existing between said Kowalski and the defendants; that said Kowalski commenced an action on the note due January 2, 1905, and that the same was dismissed because of his failure to comply with an order requiring him to file security for costs, and judgment for costs amounting to $32.20 was recovered against him in said action; that prior to the date of the execution and delivery of said notes said Kowalski was indebted to the de-

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fendant *Stanley E. Czerwinski* in the sum of $102.23, together with interest thereon, and to the defendant *Albert H. Czerwinski* in the sum of $171.75, with interest, and to the defendant *Max Dominski* in the sum of $311, and to the defendant *John Gawin* in the sum of $112.95; that said Kowalski is now, and ever since the maturing of each of said notes has been, insolvent; that the plaintiff is not and was not a *bona fide* holder of either of said notes, and that said Kowalski is the real and sole owner of the same; that plaintiff is only interested therein as attorney for Kowalski; that plaintiff paid not more than the sum of $100 for the note first maturing, and not to exceed $150 on the second of said notes.

As conclusions of law the court found that the sums due to the several defendants from said Kowalski constituted equitable counterclaims of said defendants against any sum found to be due upon the notes in suit, and that the defendants were entitled to judgment dismissing the complaint.

No bill of exceptions was settled in the case, so that the findings of the court are verities. The error assigned is that the findings of fact do not support the conclusions of law and the judgment entered thereon.

For the appellant there was a brief by *Markham & Schoellkopf*, and oral argument by *Henry Schoellkopf*.

For the respondents there was a brief by *Churchill, Bennett & Churchill*, and oral argument by *W. H. Churchill*.

BARNES, J. Under the findings made by the court this action might well have been dismissed under the provisions of sec. 2605, Stats. (1898), because not brought by the real party in interest and because it was not shown that the plaintiff came within any of the exceptions contained in the statute.

The contention of the appellant is that the findings do not support the judgment. From them it appears that Kowalski is a nonresident; that he is insolvent; that he honestly owes the defendants sums exceeding the amount of the notes sued

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on; and that if they cannot set off the indebtedness due from him against the plaintiff they must lose it altogether.

Subd. 3, sec. 2656, provides that, where a plaintiff is a nonresident of the state, any cause of action arising within the state and existing at the commencement of the action may be pleaded as a counterclaim, with one exception not material here. Sec. 2606 provides that, in case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any setoff or other defense existing at the time or before notice of the assignment. The section does not apply to a negotiable promissory note transferred in good faith before due. Sec. 4258 provides the cases in which a demand by one party may be set off as a defense in whole or in part to the demands of the other. If the action or counterclaim be founded upon a contract, such setoff must be founded on contract, express or implied, and must be due to the party in his own right, and must have existed at the time of the commencement of the action and must have then belonged to the party claiming to set off the same.

Subd. 5 of the section reads:

"If the action or counterclaim be founded upon a contract, other than a negotiable promissory note or bill of exchange, which has been assigned to the party a demand existing against such party or any assignor of such contract, at the time of his assignment thereof and belonging to the opposite party, in good faith before notice of such assignment, may be set off to the amount otherwise recoverable upon such contract if the demand be such as might have been set off against the party or assignor while the contract belonged to him."

Sec. 4264 provides that setoff shall be pleaded as a counterclaim.

If the indebtedness from Kowalski to the defendants was a joint indebtedness due them, there could be no question about the right of the defendants to set the same up as a counterclaim in this action. There is authority which holds that, under statutes permitting setoffs and counterclaims to be

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pleaded, any defendant may plead any proper matter that is the subject of setoff or counterclaim in reduction of damages which the plaintiff might otherwise be entitled to recover, where the action is brought on a joint and several liability against several defendants. Pomeroy, Code Rem. (3d ed.) §§ 755, 761; *Wilson v. Exchange Bank,* 122 Ga. 495, 50 S. E. 357; *Austin v. Feland,* 8 Mo. 309; *Leach v. Lambeth,* 14 Ark. 668. And in *Powell v. Hogue,* 8 B. Mon. 443, it is held, under like statutes, that one of several defendants sued upon a joint note may set off a demand due to himself from the plaintiff against the demand due upon the joint note. In the case at bar the trial court held that the matter set up in the answers of the defendants constituted equitable counterclaims, and offset the amounts due thereon against the amounts due upon the notes. The indebtedness of the defendants being joint, the trial court was evidently of the opinion that the causes of action set forth in the answers of the defendants did not constitute legal counterclaims.

The judgment rendered by the circuit court was correct. The payee named in the notes was a nonresident and was insolvent. Assuming that the defendants could not counterclaim at law, it was within the province of a court of equity, and it was entirely proper for it, to afford the relief granted against the insolvent debtor. *Smith v. Dickinson,* 100 Wis. 574, 578, 76 N. W. 766; *Pendleton v. Beyer,* 94 Wis. 31, 68 N. W. 415; *Seligmann v. Heller Bros. C. Co.* 69 Wis. 410, 34 N. W. 232.

"A court of equity will permit such equitable setoff whenever justice requires it, even in a case not coming within the statute of setoffs." *Jones v. Piening,* 85 Wis. 264, 268, 55 N. W. 413.

It was also within the right of any of the defendants to set off his entire claim against that of the plaintiff in order to reduce the amount he might be called upon to pay in the event of execution being issued upon the judgment. The

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offsetting of such claims against the plaintiff in this action would bar the defendants from thereafter beginning any action against Kowalski upon the claim so offset.

By the Court.—Judgment affirmed.

ESTATE OF LEISER: PERELES and another, Executors, Respondents, vs. LEISER, Executor, Appellant.

February 17—March 9, 1909.

Executors and administrators: Claims not filed within time limited: Allowance: Mortgages: Foreclosure: Deficiency judgment against executor.

A judgment for deficiency on foreclosure of a mortgage, entered in the circuit court against an executor as such and ordering payment out of the estate in his hands, may properly be allowed by the county court as a claim against the estate, although not filed as such until after the expiration of the time limited for the filing of claims.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was tried in the court below upon the following stipulated facts: That a judgment of deficiency in the case of B. F. Pereles in his lifetime was entered upon a mortgage foreclosure against *Isidor Leiser* as executor of the estate of Sarah Leiser, deceased, of $596.43 on February 5, 1902; that no copy of the note or claim was ever filed in the probate court of this county in which the estate was then pending; that due notice to creditors had been previously given, and the time for filing claim had expired before bringing the foreclosure action; that a foreclosure action was brought upon the original mortgage and the property sold at sheriff's sale, in which *Isidor Leiser,* as executor, was made

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party defendant; that no appearance was made in that action until application was made for the confirmation of the sale and report of sheriff, which application was made for a deficiency judgment; that at that time *Isidor Leiser,* as executor, appeared by his attorney in the circuit court of this county and objected to the entry of the deficiency judgment for the reason that no claim had ever been filed against the estate; that an appeal was taken from the order of the circuit court directing the deficiency judgment against the estate, which appeal was dismissed in the supreme court for the reason that it was not taken within the two years from the entry of the original judgment of foreclosure; that a *remittitur* was filed in the circuit court, and that the judgment of the circuit court for deficiency upon the filing of the *remittitur* from the supreme court was filed as a claim in the probate court of this county against the estate of Sarah Leiser, deceased, for the sum of $596.43 and interest; that this judgment was filed as a claim against the estate long after the expiration [of the time] for the filing of claims under the order of the court, and no application has been made in the county court to enlarge the time for the filing of claims as shown by the record.

It was further stipulated that *Isidor Leiser,* prior to any proceeding had in this matter, had been appointed as executor of the estate of Sarah Leiser, deceased, under the will, and that said will had been admitted to probate and said *Isidor Leiser* had duly qualified, and that since the obtaining of the deficiency judgment B. F. Pereles died, and that *Max* and *Herman Pereles* have been regularly appointed by the probate court as executors of the estate of B. F. Pereles, deceased, and that all necessary proceedings have been had for the revival of the action in their names as such executors; that James H. Stover was duly appointed by the probate court of this county as guardian *ad litem* of the minor heirs of Sarah Leiser, deceased.

It was further stipulated and agreed that *Isidor Leiser,* as

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executor of the estate of Sarah Leiser, deceased, appeared by counsel in the probate court and objected to the allowance of the judgment as a claim against the estate, and that one of the minor heirs, a daughter of Sarah Leiser, who is still a minor, also appeared both by counsel and by her guardian *ad litem*, James H. Stover, and objected to the allowance of said claim; that the claim was allowed by the county court and no part of it has been paid. It was further stipulated that said claim was objected to on the part of *Isidor Leiser*, executor, and also on the part of the minor, on the ground that said claim was not filed within the time required by law, and that the statute of limitations had run upon the filing of said claim, which was objection to the allowance of said claim.

Upon the foregoing stipulated facts the court on February 20, 1908, rendered judgment adjudging that the order of the county court be affirmed, from which judgment this appeal is taken.

H. L. Eaton, for the appellant.

The cause was submitted for the respondents on the brief of *W. O. Thomas*.

KERWIN, J. The judgment of the circuit court standing unreversed against the executor of Sarah Leiser, deceased, and ordering the amount of such judgment paid out of the estate, is conclusive at least against the executor and could be enforced against him in the usual manner for the collection of judgments. Of course the rule is well settled in this state that after the time for presenting claims against the estate of a deceased person has elapsed all claims become barred and extinguished. *Winter v. Winter*, 101 Wis. 494, 77 N. W. 883; *Carpenter v. Murphey*, 57 Wis. 541, 15 N. W. 798; *Austin v. Saveland's Estate*, 77 Wis. 108, 45 N. W. 955; *Field v. Estate of Mundy*, 106 Wis. 383, 82 N. W. 343; *Davis v. Davis*, 137 Wis. 640, 119 N. W. 334. Whether the judgment creditor in this case would be entitled to allowance

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of his claim against the estate as matter of right we need not and do not determine. It is sufficient that he was entitled to enforce it against the executor as executor of the estate of Sarah Leiser, deceased, and collect it out of any property which might be found belonging to the estate in the possession of the executor. So if the judgment was a proper judgment to be paid by the executor, it was permissible for the county court to allow the amount of such judgment and order its payment, that being simply a mode of aiding in the collection thereof. This, as we understand it, was the effect of the allowance of the judgment in the county court affirmed on appeal. Under such circumstances we cannot say that any one was prejudiced by the allowance of the claim; therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

WESTERN LIME & CEMENT COMPANY, Appellant, vs. COPPER RIVER LAND COMPANY, Respondent.

February 18—March 9, 1909.

(1) *Contracts: Construction by court: Findings of fact: Presumption on appeal.* (2–7, 9) *Vendor and purchaser: Exception or reservation? When title passes: Rights of vendor's assignee: Removal of timber excepted from grant: Limitation of time: Condition subsequent: Payment of taxes.* (8) *Parol evidence affecting writing.*

1. Where the trial court decides and finds that a contract is not ambiguous so as to justify consideration of extrinsic evidence as to the surrounding circumstances, further so-called findings as to the intention of the parties evinced by various clauses of the contract are not findings of fact in favor of which there would be a presumption on appeal, but are merely conclusions of law reached in construing a writing from its own terms.
2. A land contract and a deed made in execution thereof, in both of which the words "excepted" and "reserved" were used inter-

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changeably with respect to timber on the land, are construed as showing an intention of the parties that such timber should be excepted from the conveyance, and it is *held*, therefore, that the title thereto remained in the grantor.

3. Under a land contract and a subsequent deed in pursuance thereof the real transfer of title takes place at the time of the contract, at least in case of part payment of the consideration, and the deed when made relates back to the date of the contract.
4. Where in such case the deed is made by a transferee of the rights of the original vendor subject to the land contract and, as to the right to cut and remove timber excepted from the grant, expressly refers to the terms and conditions of the contract, such terms and conditions control that right.
5. Where otherwise the result would be unreasonable or absurd, a mere agreement in a land contract to remove within a certain time standing timber which is to be excepted from the conveyance may be construed to include a further agreement that failure to so remove the timber shall be deemed a breach of a condition subsequent and divest the vendor of his title thereto.
6. So *held* as to a contract for the sale of a large tract of land for the known purpose of colonization and sale in small parcels to settlers, where no right of actual occupancy and use could be transferred to such settlers so long as timber belonging to the original vendor remained on the parcels purchased by them.
7. In a contract for the sale of 37,000 acres of land excepting the standing timber, an agreement by the vendor to remove all of such timber at the rate of at least 6,000 acres per year was followed by a provision that in case of his failure to do so he should pay such enhancement of taxes as resulted from the timber remaining on the land. It appeared, among other things, that at the time of making the contract the estimate of the amount of the timber was approximate only and the capacity of the vendor's mills to consume in each year the product of 6,000 acres was doubtful. *Held* that, while removal of the timber was a condition subsequent, yet it was the evident intention of the parties that there should be some period of grace during which the failure of strict performance should not work a forfeiture of the vendor's title to the timber; and such period not being specified, the vendor was entitled to a reasonable time, in view of all the circumstances, for removal of the timber after the expiration of the time expressly stipulated.
8. Generally, verbal negotiations between parties who finally reduce their contract to writing are incompetent, except so far as they are declaratory or evidentiary of facts and circumstances in the light of which the contract is made and in the light of which thereafter it may be construed.

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9. In a contract for sale of a large tract of land to a company for colonization purposes the timber was excepted and the vendor agreed to pay the taxes until all the timber had been removed or until a tract or tracts should be sold or contracted by the purchaser to third persons. *Held*, that assignment of the contract by the purchaser to another company was not such a sale of a tract or tracts as relieved the vendor from payment of taxes.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

In September, 1899, the Upham Manufacturing Company entered into a land contract with the Rib River Farm Land Company for the sale to the latter of approximately 37,000 acres of land, situated in Taylor and Lincoln counties, covered by timber so as to be unavailable to the purchaser for its known purpose of colonization and sale in small parcels to settlers. The land contract, after agreeing to convey upon payment of the purchase price of something over $92,000, in instalments, $26,000 cash and $10,000 at intervals thereafter up to May 25, 1902, with interest, contained the following:

"And this agreement and such conveyances being and to be subject to reservations and exceptions following, to wit: All timber and forest products of or on said lands, save only such growth as is fit for cord wood only, being growth five inches in diameter or under, are and are to be excepted from such sales and conveyances, and are expressly reserved by said party of the first part to itself, its successors and assigns, with the right to cut and remove the same. And the said party of the first part hereby agrees and binds itself, its successors and assigns, to cut and remove the said timber and forest products so reserved to itself at the rate of at least six thousand (6,000) acres per year, commencing May 1st, 1900, and in case of failure so to do, said party of the first part shall at all times be liable for and pay any increase of taxes or assessments levied or made by reason of such timber remaining or continuing upon the lands while the same remains or continues thereon. Said party of the first part also excepts and reserves to itself, its successors and assigns, from the operation of this agreement and from such conveyances, the necessary grounds for sawmill or manufacturing plant and site and

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pond on Rib river or elsewhere, to be selected by it within one year from the date hereof, and also excepts and reserves to itself, its successors and assigns, from the operation of this agreement, and such conveyances, a strip not exceeding one hundred (100) feet in width, for right of way for railway or logging railroad and spurs over such of said lands as such railroad or spurs when projected may cross or enter upon, such strip to be selected, and such railroad and spurs to be projected and surveyed, by said party of the first part within such time as may be reasonable, considering the need and state of development of said lands. . . . Said party of the first part further agrees and binds itself, in case of sales by said second party to actual settlers of any of such tracts of forty acres or over, so paid for and conveyed hereunder, that it, said first party, will, upon written request, cut such tracts in the next logging season and peeling season after such request, and then it will give preference to such settlers in case they or any of them should wish to work at cutting and logging on the premises purchased by them respectively, as employees of said first party on such lands in said work. And in consideration of the premises said party of the first part further agrees and binds itself to build, within nine months from the date hereof, at least ten miles of railroad within said counties, or from Athens, Wisconsin, toward and into said counties or one of them. It is further agreed and understood that said party of the first part is to pay the taxes on said lands until it shall, first, have given to said party of the second part written notice that all timber has been removed from tracts specified in such notice, or, second, until a tract or tracts shall have been sold, or contracted by said second party to some third person or persons, and thereupon, and in either of said events, and thereafter, the party of the second part shall pay all taxes and assessments on all tracts so specified in such notice, or so sold or contracted."

Prior to 1902 the rights and obligations of the Upham Manufacturing Company became transferred to the Marshfield Land & Lumber Company, subject to said contract. The rights of the Rib River Farm Land Company as to certain specified lands constituting about one quarter of the acreage became transferred to the plaintiff, *Western Lime & Cement Company,* and the interest of the Rib River Farm Land Com-

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pany in the remainder of said lands was conveyed back to the Marshfield Land & Lumber Company. In September, 1902, the Marshfield Company executed to the plaintiff warranty deeds, one for each county, of the lands to which it had acquired the contract rights, which are the lands described in the complaint. Those deeds, after full words of conveyance and prior to the *habendum* clause, contained the following:

"This conveyance is subject to the reservations and exceptions following: The said party of the first part does hereby except from sale and reserve to itself, its successors and assigns, all the timber and forest products of or on said lands, save only such growth as is fit for cord wood only, and all such timber and forest product fit and valuable for any other purpose than cord wood is expressly reserved by the said party of the first part to itself, its successors and assigns, with the right and license to enter upon said lands, and cut and remove the same, according to the terms and conditions of" the land contract.

Later, on May 18, 1906, the reserved rights of the Marshfield Company were conveyed to the defendant by an ordinary deed of conveyance "subject to the terms and conditions of said contract." In the logging seasons between the date of the contract and that of 1906 and 1907 the Upham Company, by authority of the Marshfield Company, cut the timber on about 14,000 acres of the lands covered by the original contract, but practically none upon the lands described in the complaint, and in the following year, prior to the commencement of this action, the defendant cut 6,600,000 feet, a part thereof from plaintiff's lands, and was threatening to continue its cutting upon plaintiff's lands at its convenience thereafter, claiming to own all the timber and forest products other than those conveyed only for cord wood.

Plaintiff commenced this action to establish its title to all timber upon the lands mentioned in the complaint, to enjoin defendant from entering and cutting any thereof, and to require the defendant to account for all that had been cut and removed subsequent to May 1, 1906, a date apparently

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adopted as the expiration of seven years after the date of the land contract.

Upon the trial a large amount of parol testimony was taken both as to the situation and business purposes of the parties to the contract, and also as to their oral negotiations and agreements and as to their understanding of certain terms of the written contract. The court in its finding declared that the contract was not ambiguous and that the extrinsic evidence should not be considered. He, however, obviously did consider the extrinsic evidence as to the character of the land and the extent to which the presence of the timber prevented any practical occupation or use of it by the plaintiff, in finding as a fact that the timber so covered the land as to render "the surface thereof unavailable to plaintiff while said timber remained thereon." It was found as a fact that the timber was not conveyed, but remained the property of the Upham Manufacturing Company and its assigns, together with a right to enter and cut at any time without limitation, subject only to liability for damages for breach of its covenants to remove.

As conclusions of law he held that plaintiff did not own any of the timber; that defendant owned all of it on the lands described in the complaint, and plaintiff was entitled to no relief in this action, and entered judgment dismissing the complaint, but without prejudice to plaintiff's right to maintain an action to compel the removal of said timber and for damages for breach of the agreement to cut; from which judgment plaintiff appeals.

For the appellant there were briefs by *Harrison S. Green*, attorney, and *Van Dyke & Van Dyke*, of counsel, and oral argument by *Mr. Green*.

For the respondent there was a brief by *Quarles, Spence & Quarles*, attorneys, and *A. E. Thompson* and *George Lines*, of counsel, and oral argument by *Mr. Lines* and *Mr. Thompson*.

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DODGE, J. The trial court reached the conclusion that the contract in question was not ambiguous so as to justify consideration of the surrounding circumstances needing to be disclosed by extrinsic evidence. The so-called findings of fact, as to the intention of the parties evinced by various clauses thereof, therefore are not such, but merely his conclusions of law in the judicial function of construing a writing from its own terms. We must therefore approach the question of construction as an original one, unaided and unembarrassed by the presumption in favor of a finding of fact.

The first question, very much debated, is whether the forest products other than cord wood, which for brevity we shall hereafter designate timber, were excepted from the conveyance to the plaintiff's grantor, or whether there was merely a reservation of a right to enter and retake such timber, a distinction which is well recognized in the authorities. The expressions used, both in the deed and contract, are "excepted" and "reserved," sometimes one and sometimes the other. Such interchangeable use of the two terms of itself creates a measure of ambiguity. *Pritchard v. Lewis,* 125 Wis. 604, 104 N. W. 989. But from consideration of the entire contract and the purposes of the parties as they are disclosed by the contract itself, we reach the conclusion that, so far as the parties had intention on the particular subject, it was to the effect that the title to the timber should remain in the original owner and not be conveyed either by the contract or the deed. We do not deem it necessary to enter into extended discussion of the reasons for such conclusion. It is supported by very much the same reasoning as contained in *Pritchard v. Lewis, supra,* and the authorities therein cited; also by *Williams v. Jones,* 131 Wis. 361, 111 N. W. 505. Starting, therefore, with that definition of the title, we have yet to consider the force and effect of the clause in the contract whereby the defendant's predecessor agreed to remove such timber at the rate of 6,000 acres per year, or, in other words, the whole of it within seven years. We deem that provision of the con-

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tract to control defendant's rights, both because of the special reference thereto contained in the deed made in execution of the original land contract, and because of the principle, well established in Wisconsin, that the real transfer of title under a land contract and a subsequent deed in pursuance thereof takes place at the time of the contract, at least in case of part payment of the consideration, and that the deed when made relates back to the date of the contract. *Krakow v. Wille,* 125 Wis. 284, 103 N. W. 1121. The trial court treated this clause as a mere promise, with no result from its breach except money damages. Appellant contends that the parties intended thereby to limit the right to the timber and that by its breach a forfeiture results. It is urged, on authority, that courts will be slow to import into a mere agreement to do some act, a further agreement that the failure to perform it shall constitute a condition subsequent sufficient to divest an existing title. Nevertheless if from the contract, properly construed, we must conclude that the parties intended and attempted to express an agreement to that effect, it is our duty to so construe and enforce it. Justification for construction of even very plain words in a contract may arise if otherwise the result would be wholly unreasonable or absurd. *Corbett v. Joannes,* 125 Wis. 370, 387, 104 N. W. 69. It seems to us that in a sale of a large tract of land to a purchaser for the purpose of presently selling the same in parcels to actual settlers, an agreement that the seller might persist in practical possession and occupancy of the whole of said land, so that as to none of it could anything but a bare legal title without right of occupancy and use be transferred to such settlers, would be unreasonable to the extent of absurdity. It would be in practical negation of the acquisition of the rights for which it is apparent the purchaser pays his money. We cannot read this clause, so industriously inserted, in any other light than indicating the intention of the parties to express an agreement for some limitation upon the right of the seller to

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occupy said land with its timber to the exclusion of the purchaser and its anticipated and intended grantees. How it should be effective as a limitation, whether by mere threat of damages, or by way of some termination of the seller's right, is not declared. A right to recover damages for breach of this agreement would not accomplish the obvious purpose of placing the lands in a condition for use by the purchaser, and the amount of the money damages really suffered would be almost conjectural. The situation is not without precedent or at least analogy in several cases which have come before this court with reference to contracts or conveyances separating the title to the standing timber from the title to the soil, and in nearly all of them an expression of a time limit within which the right of severance of the timber from the land is to be exercised has been held sufficient to express a meeting of the minds of the parties upon the intention that the right to the timber and to enter for removing the same should be terminated at the end of such period. In other words, that the declaration of such duty to remove, whether in the form merely of a covenant or a limitation, implied a condition subsequent on the happening of which the right should terminate. *Smith v. Scott,* 31 Wis. 437, 440; *Golden v. Glock,* 57 Wis. 118, 15 N. W. 12; *Hicks v. Smith,* 77 Wis. 146, 46 N. W. 133; *Williams v. Jones,* 131 Wis. 361, 111 N. W. 505; *Peshtigo L. Co. v. Ellis,* 122 Wis. 433, 100 N. W. 834. Another class of cases presents numerous instances where words of mere covenant have been held sufficient to express a real intention of a condition subsequent and resulting forfeiture by reason of the impossibility otherwise to avert inequitable results. Illustrations are: *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Burgson v. Jacobson,* 124 Wis. 295, 102 N. W. 563. We are convinced that the reasons of such analogous decisions should control the instant situation and lead us to construe this limitation of time as declaring a condition subsequent.

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If, therefore, the agreement to cut and remove all the timber within seven years stood alone, we should be unable to avoid the conclusion that defendant's right thereto had ceased, whether that right was a title excepted from the grant to the plaintiff's predecessor or merely a reservation of a privilege to enter and remove the timber. That agreement, however, does not stand alone. It is immediately followed by the provision of the contract that if the owner does not remove the timber within the time limited he shall be subject to other duties, namely, the payment of such enhancement of taxes as results from the presence of the timber on the land. This provision is extremely significant of the mental attitude of the parties to the contract. It is inconceivable that they should have thus embodied it in immediate context with an absolute agreement to remove the timber at the rate of 6,000 acres per year unless they had contemplated that in some contingency that agreement might not be carried out; and yet it must have been their intention that, even though not carried out according to its strict letter, the seller should continue to have some rights in the timber upon which it was to continue to pay taxes. Still, we are unable to bring ourselves to a belief in an intention that there should be no limit of the time within which it must remove it or forego all right thereto. In this state of uncertainty as to just what purpose was intended to be expressed by these somewhat contradictory provisions, we have been driven to consider certain facts with reference to the situation of the parties at the time of contracting: such as that the seller was a manufacturer of lumber and lumber products, with mills adapted to the use of the timber on these lands; that the estimate of the amount of timber on the lands was approximate only, and that the capacity of the mills to consume in each year the product of 6,000 acres was necessarily doubtful, although the seller asserted such capacity with great positiveness. Again, both parties must have realized that business or climatic conditions might

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affect the practical possibility of carrying out the letter of the agreement for removal. We think it fairly apparent, from the context of an agreement to remove at a definite rate and of a provision recognizing failure to do so as within contemplation, that there was an intention on both sides, as somewhat of an afterthought, to annex to the positive agreement some measure of elasticity and to allow some grace to intervene between a breach of the express agreement to remove and the absolute forfeiture of the seller's right to the timber. The length of such period of grace has no expression in the contract, but, according to a principle of construction applicable to all contracts, that parties who stipulate for the doing of some act and do not specify the time therefor intend that it shall be done within a reasonable time, we are moved to the conclusion that the real intention was that the timber must be removed as specified, at the rate of 6,000 acres per year, but that if the seller in the course of events should not be able to accomplish it exactly within that period, he must do so within a reasonable time thereafter. No finding has been made as to whether such reasonable time has yet expired for the removal of all of the timber in due and diligent effort to comply with the spirit of the contract, in view of the situation of the parties and their known purposes with reference to the dealing in the land on one side and the timber on the other at the time of the making of their contract. We do not feel that the question has been tried sufficiently for us to safely undertake to make answer thereto from the record, or, if we should conclude that the reasonable time has not expired, to fix the limit thereof. We are persuaded that question should be carefully tried in the circuit, and that court should, from evidence already taken and such additional as may be introduced, decide when such period will expire, if it appears that it has not, and adjudge that at the termination of the period so found the rights of the defendant in all timber then remaining upon the plaintiff's lands shall terminate, and that meanwhile its right to enter and remove shall persist.

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In considering the subject of a reasonable time to remove the timber the court will doubtless need to consider the facts, circumstances, and conditions surrounding the making of the original contract as bearing upon the reasonableness of any term; not only with reference to the reasonableness of a period as a restriction upon the very obvious intention that the Upham Company was to own and have a right to remove all the timber, if it proceeded diligently, but also with reference to impairment and delay of the Rib River Company's enjoyment of the lands which it purchased in the manner it was known to contemplate and intend enjoyment and use.

The trial below was characterized by the offer and admission *de bene esse* of a great deal of wholly improper and irrelevant evidence as to what the parties agreed on in parol and as to their understanding of the meaning of the terms used in the written agreement. Generally, verbal negotiations between parties who finally reduce their contract to writing are incompetent, except so far as they are declaratory or evidentiary of facts and circumstances in the light of which the contract is made and in the light of which thereafter it may be construed. The subject has had careful exposition in several cases and proper distinctions noted. Some of those cases are: *Brittingham & H. L. Co. v. Manson,* 108 Wis. 221, 84 N. W. 183; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 93 N. W. 459; *Corbett v. Joannes,* 125 Wis. 370, 388, 104 N. W. 69; *Loree v. Webster Mfg. Co.* 134 Wis. 173, 114 N. W. 449; *Hackley Nat. Bank v. Barry,* 139 Wis. 96, 120 N. W. 275.

To avoid uncertainty, we think it best to express our opinion on the rights and duties of the respective parties as to taxes, although there seems to have been no disagreement thereon prior to the commencement of this action. The last-quoted clause of the land contract required the seller to pay all taxes on the land until it had removed the timber from any specific parcel thereof and given written notice of such removal, or until a tract or tracts shall have been sold or con-

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tracted by said second party to some third person or persons. The Upham Company and its assigns did pay all taxes that had become due up to the commencement of the action. Our opinion is that the assignment of the contract from the Rib River Company to the plaintiff was not a sale of any parcel or parcels of land within the meaning of this clause. That phrase, we think it obvious, had application to those sales to individual settlers mentioned elsewhere in the contract and manifestly within the contemplation of the parties; hence that the duty of the defendant has persisted and will persist until it removes the timber, if the court shall finally decide that it is entitled to more time, subject, of course, to the condition that actual sales to settlers of individual parcels will terminate that duty, except for the other agreement to pay any enhancement of the taxes on lands sold by reason of defendant's timber remaining thereon after the sale.

By the Court.—Judgment reversed, and cause remanded for further proceedings in accord with this opinion.

TIMLIN, J., took no part.

HECKENDORN, Appellant, vs. ROMADKA, imp., Respondent.

February 18—March 9, 1909.

Discovery: Examination to enable plaintiff to plead: Sufficiency of affidavit: Cause of action: Corporations: Fraud inducing subscription to stock: Acts of officers: Liability, joint and several: Parties: Election of remedies: Trusts and trustees.

1. Under sec. 4096, Stats. (Supp. 1906), authorizing examination of an adverse party to enable plaintiff to frame his complaint upon an affidavit stating "the general nature and object of the action," etc., the affidavit need not state facts constituting a cause of action, but is sufficient if the facts stated show that plaintiff may be entitled to recover.

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2. An affidavit stating that plaintiff subscribed and paid cash to the defendant corporation for certain shares of its stock; that defendant R. was an officer of the company and owned a controlling interest therein; that he and the officers and representatives of the company managed its affairs, and as such fraudulently misrepresented its financial condition and the value and productiveness of its property, and thereby induced plaintiff to subscribe for and purchase said shares; and that R. finally, through fraud, secured title and possession of all the company's property and assets,—is *held* to show that plaintiff has a cause of action against the defendants for fraud committed by them jointly.
3. Plaintiff, in such case, need not pursue the joint wrongdoers separately or seek relief against those only into whose hands he can trace the funds. The benefit secured by any one of the participants is deemed a benefit to all, and each is individually liable for the whole injury.
4. Plaintiff has in such a case the right to pursue any one of several courses to remedy the wrong; and a statement in his affidavit under sec. 4096, Stats. (Supp. 1906), that the general nature and object of the action is for a rescission of the subscription contract and for the recovery of the money paid, does not constitute an election of remedy so as to limit him in the framing of the complaint after he has learned the details of the transactions through the proposed examination.
5. The statement in plaintiff's affidavit that the defendant R., as stockholder and director, and through his sons, who were also directors, controlled the corporate property and affairs and so manipulated them as to secure possession of all the property and assets of the company, justifies a claim that he as well as the company may be found to have received plaintiff's property through their joint wrong and may therefore be chargeable as a trustee for the plaintiff.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

This is an action for the rescission and cancellation of the subscription for and the purchase of certain shares of stock in the defendant corporation (El Globo Mining and Milling Company) issued November 30, 1906, and for the recovery of the money paid therefor, with interest, on the ground that the subscription and purchase of the stock were induced by the false and fraudulent representations of the defendants. The

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discovery of facts alleged to be within the knowledge of the secretary of the defendant company and the defendant *Romadka* is sought in order to enable the plaintiff to frame his complaint. Discovery is sought as to the ownership, title, time when acquired and from whom, and the consideration for the El Globo mine; as to the organization, when, where, and how, of the defendant company; the facts regarding the issuance of stock, the subscriptions to and ownership of the stock, the officers elected, their acts and their management of the affairs of the defendant company; the amount of money expended by the company, when, where, how, and by what authority; like facts as to the El Globo Mining and Milling Company of Mexico; as to the authority under which a certain circular to induce subscriptions was issued by the agents of the defendants; as to the reports made to the defendant company by Charles A. Romadka, president of the company and son of the defendant *Romadka;* and as to the report made by the directors to the stockholders; and as to the financial transactions between the defendants and by them or either of them with the El Globo Mining and Milling Company of Mexico. Discovery is also sought as to the development and work done on the El Globo mine and as to the amount of money expended by the defendant *Romadka* and his sons upon this mine prior to the incorporation of the defendant company; as to the production of ore and the shipments from the mine from August 25, 1902, to January 1, 1905, and the smelter returns therefrom; and as to the statements made or authorized to be made by the defendant *Romadka* to the plaintiff and other stockholders in relation to the defendant company prior to the time when plaintiff subscribed for and purchased his stock.

The defendant *Romadka* made an affidavit that he had never, directly or indirectly, made or caused to be made to the plaintiff or any other person any false or fraudulent representation, and that he was not, and for a long time prior to

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the commencement of this action had not been, an officer of the defendant corporation. He made this affidavit for the purpose of obtaining an order from the court requiring the plaintiff to show cause why the order requiring the defendant *Romadka* to submit to an examination under sec. 4096, Stats. (Supp. 1906), should not be vacated, or, if the court should not grant an order absolutely prohibiting the examination, why defendant's examination should not be limited strictly to the matters which would enable plaintiff to obtain information from the defendant *Romadka* which would tend to establish his personal liability.

The court issued an order for the plaintiff to show cause why the proceedings requiring the defendant *Romadka* to submit to an examination should not be vacated or limited. At the hearing on this order to show cause plaintiff submitted a supplementary affidavit stating that plaintiff was informed and believed that the defendant *Romadka* had been in direct or indirect control of the affairs of the defendant company through his ownership or control of a majority of the stock of the defendant company; that a large portion of the money derived from the sale of the balance of the stock had been wasted, misappropriated, and misapplied by the board of directors of the defendant company under the control and direction of the defendant *Romadka;* that this defendant, through the assignee of a fraudulent claim in favor of the defendant *Romadka,* had fraudulently procured a judicial sale of the property of the defendant company; and that this assignee was holding the property of the defendant company so acquired for the use and benefit of the defendant *Romadka.* The affidavit enumerates specific misrepresentations which are alleged to have induced plaintiff to subscribe for and purchase his shares of stock and which are alleged to have been directly or indirectly procured by the defendant *Romadka.* The court made an order absolutely vacating and setting aside the proceedings for the examination of the defendant *Ro-*

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madka and enjoining the proposed examination. This is an appeal from such order.

For the appellant there were briefs by *Frank M. Hoyt,* and oral argument by *L. A. Olwell.*

For the respondent there were briefs by *Kronshage, McGovern, Goff, Fritz & Hannan,* attorneys, and *Thos. H. Gill,* of counsel, and oral argument by *Theodore Kronshage.* They contended, *inter alia,* that no cause of action for rescission exists against the defendant *Romadka. Franey v. Warner,* 96 Wis. 222; *Limited Inv. Asso. v. Glendale Inv. Asso.* 99 Wis. 54; *Glendale Inv. Asso. v. Harvey L. Co.* 114 Wis. 408; *J. V. LeClair Co. v. Rogers-Ruger Co.* 124 Wis. 44. Plaintiff, having elected to rescind, has waived and cannot assert the remedial rights predicated upon the opposite and inconsistent theory of a subsisting contract. *Grant v. Law,* 29 Wis. 99, 104; *Franey v. Warner,* 96 Wis. 222; *Limited Inv. Asso. v. Glendale Inv. Asso.* 99 Wis. 54; *Smeesters v. Schroeder,* 123 Wis. 116; *Davis v. Schmidt,* 126 Wis. 461; *Fox v. Wilkinson,* 133 Wis. 337, 340; *Smith v. Burns B. & Mfg. Co.* 132 Wis. 177, 186; *Pfeiffer v. Marshall,* 136 Wis. 51, 116 N. W. 871; *Wilson v. New U. S. C. R. Co.* 73 Fed. 994, 20 C. C. A. 244; *Westerfield v. New York L. Ins. Co.* 129 Cal. 68; *Fagan v. Newson,* 12 N. C. 20.

SIEBECKER, J. The purpose of respondent's examination under sec. 4096, Stats. (Supp. 1906), is to enable plaintiff to frame his complaint. To entitle plaintiff to such an examination before issue joined, the notice thereof must be "accompanied by an affidavit of the party, his agent or attorney, stating the general nature and object of the action" and "the points upon which such discovery is desired." The plaintiff attempted to fulfil these demands of the statute by the service of an affidavit stating that plaintiff seeks reimbursement for the damages he claims to have suffered through the alleged fraudulent scheme of the defendant El Globo Mining

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and Milling Company and the defendant *Charles P. Romadka,* by which he was induced to purchase and pay for stock of the corporation, and that plaintiff seeks a rescission and cancellation of such stock subscription and purchase. This remedial statute has repeatedly been declared to be a highly beneficial one, and one to be liberally construed. See *Schmidt v. Menasha W. W. Co.* 92 Wis. 529, 66 N. W. 695, and cases cited. If the facts stated in the affidavit charge that plaintiff may be entitled to recover against the defendants, then he has a right to a discovery, whether or not the imputations of fraud are well founded. Id. The requirements of the affidavit upon which such application is based were considered in the recent case of *Gratz v. Parker,* 137 Wis. 104, 118 N. W. 637, and it was there declared:

"It does not require that facts sufficient to constitute a cause of action shall be set forth therein. . . . It is not even necessary that the plaintiff should know that a cause of action existed."

This it seems must necessarily be the interpretation of this statute, for its very purpose is to enable a plaintiff to secure information that he may properly state his cause of action. As stated in the *Schmidt Case:*

"It may be that upon examination of the defendants the plaintiff will find that there is no ground for charging the defendants with fault, and expensive litigation may thus be avoided."

It is however contended by the defendant *Romadka* that the plaintiff's statement in the affidavit for discovery, namely, "that the general nature and object of the action is for the rescission and cancellation of the subscription and purchase by the plaintiff of five (5) shares of capital stock of the defendant company, . . . issued by such company to the plaintiff on the 30th day of November, 1906, and for the recovery of the money paid therefor by the plaintiff," is an election that his cause of action shall be for a rescission and cancellation, and that since, under the facts and circumstances stated, no

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cause of action does or can exist against the defendant *Romadka* because it appears he is not in possession of any of the proceeds, his examination should not be permitted. *Madison v. Madison G. & E. Co.* 129 Wis. 249, 108 N. W. 65; *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900. This contention challenges the plaintiff's right to proceed upon the ground that he has chosen to remedy his wrong by a rescission of his subscription to the stock of the defendant corporation and the recovery as damages of an amount equal to the money paid therefor. The argument is that the statement in his affidavit amounts to an election of remedy and restricts him to an action based upon implied assumpsit as for money had and received. The correctness of this claim must be ascertained from the facts now before the court and the remedies afforded by the law under such circumstances.

It is in effect stated in the affidavit that the plaintiff made the purchase of the stock of the defendant company; that he paid and the defendant company received cash in payment of the transfer; that the defendant *Romadka* was an officer of the company and owned a controlling interest therein; that he and the officers and representatives of the company managed the corporate affairs and property, and as such fraudulently misrepresented its actual financial condition, the value of its property and its productiveness, and that he finally through fraud secured the title and possession of all the company's property and assets. These statements are ample to show the general nature of the wrong of which the plaintiff complains, namely, a fraudulent scheme and purpose, wherein the respondent and the defendant company joined and whereby the plaintiff was injured and damaged. It is apparent from these facts that the defendant *Romadka,* as a stockholder of the defendant company and as an officer in charge and management of its affairs, secured a benefit through the corporation, which had obtained money for the stock sold to the plaintiff, and by ultimately gaining posses-

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sion of its property, thus through fraudulent manipulation obtaining the title to the company's property and retaining it against the right of the plaintiff and others similarly situated. *Milbrath v. State, ante,* p. 354, 120 N. W. 252. The facts and circumstances stated fully sustain plaintiff's contention to the effect that he has a cause of action against the defendants for fraud committed by them jointly. That the plaintiff, under such circumstances, has the right to seek relief for the fraud so perpetrated upon him by the defendant company and by *Romadka* as its officer and agent, we deem well sustained by the following cases: *Pittsburg M. Co. v. Spooner,* 74 Wis. 307, 42 N. W. 259; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229; *Hebgen v. Koeffler,* 97 Wis. 313, 72 N. W. 745; *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81. The doctrine of these cases is that the injured party may demand that he be made good by those who have united in the wrong resulting in his injury; and in seeking this relief he is not necessarily compelled to pursue the joint wrongdoers separately or to seek relief against those into whose hands he can trace the funds. Liability attaches upon the ground that when such a fraud is committed by several acting in concert and they reap a benefit therefrom, then they are all jointly and severally liable, and no participant can escape liability because he did not share in a pecuniary benefit of the wrong. The benefit so secured by any one of the parties is deemed to have been for the benefit of all, and each is individually liable for the whole injury. *Harrigan v. Gilchrist,* 121 Wis. 127, 280, 281, 99 N. W. 909; *Mack v. Latta,* 178 N. Y. 525, 71 N. E. 97.

The corporation is properly included as a party under the charge made in the affidavit. The allegations that defendants made fraudulent representations by which plaintiff was induced to purchase the stock and part with his money reasonably permit of the inference that its officers and agents acted authoritatively in the matter complained of, and, if sus-

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tained by proof, subjects it to liability. *Zinc C. Co. v. First Nat. Bank, supra.* The situation thus presented invests plaintiff with the right to pursue one of several courses to remedy the wrong. He had the right to restore the original situation, rescind the contract, and recover back his money. He may offer to restore, and, by keeping such offer good, sue in equity for a rescission of the contract and for a recovery of his money. Without restoring, he or all similarly interested joining may sue in equity to charge such person as a trustee of the profits fraudulently retained by him and for an accounting. Or he may sue such person at law for the damages resulting from the fraud. True, plaintiff states the general nature and object of his action to be for the rescission of the subscription contract and for the recovery of the money paid thereon. This, however, cannot be held to be an election of remedies so as to limit him in framing his complaint to an action upon implied assumpsit as for money had and received after he shall learn the details of the transactions from respondent's examination. It may well transpire that facts will be elicited according with the purpose so declared and upon which an action in equity either for a rescission of the contract and the recovery of the money, or, without a restoration of the stock, an action to charge defendants as trustees of the profits fraudulently retained by them and for an accounting may be framed as affording the most complete and efficient remedy. The charge that the respondent, as stockholder and director, and through his sons, who were also directors, controlled the corporate property and its affairs and so manipulated the same as to secure possession of the property and assets of the company, amply justifies the claim that he as well as the company may be found to have received the property of the plaintiff through their joint wrong, and may, under the doctrine of the foregoing cases, establish the relationship of a trustee as between him and the plaintiff.

We are of opinion that the court erred in vacating and set-

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ting aside the proceeding to examine the respondent before issue joined under sec. 4096, Stats. (Supp. 1906), in enjoining plaintiff from proceeding further therein, and in dismissing the action as to the respondent.

By the Court.—The order appealed from is reversed, and the cause remanded to the trial court for further proceedings according to law.

WINNEBAGO PAPER MILLS, Appellant, vs. KIMBERLY-CLARK COMPANY, Respondent.
SAME, Respondent, vs. SAME, Appellant.

February 19—March 9, 1909.

Waters: Conveyance of water-power dam, canals, etc.: Title to lock: Easement or fee?

1. Pursuant to an act of the legislature in 1847, a dam was constructed across the south channel of Fox river, with a canal and a lock for the passage of boats. In 1862 the federal government built a canal on the other side of the river, and the lock thereafter fell into disuse. In 1867 the owners conveyed the dam, together with an easement over the lands occupied by its ends for the purpose of maintaining it; also all their right, title, and interest in and to the water held and water power created by the dam, and the land occupied by the canal and race used for carrying water from said dam to the mills in the village, to the width of 100 feet each, as specified in the plat. It appeared, among other things, that the statute authorizing the dam required the construction and operation of the lock as a component part of the improvement; that the lock, though disused, was maintained until after the conveyance; that its maintenance or the construction of a new one by the owner of the water power could probably be compelled; that the lock was only thirty-five feet wide while the width of the canal and race was correctly stated in the conveyance as 100 feet; that the lock was located upon an arm of the canal and was not itself used to convey water to mills, but the portion of such arm above the headgates had been so used; and that without the use or

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control of the lock the power conveyed might be largely impaired. *Held*, that the lock constituted a part of the canal and was included in a conveyance thereof, though not specifically mentioned.

2. The rights of the parties under such conveyance are to be determined as of the date thereof, and the subsequent filling up of the canal or lock could not operate to divest the title acquired.
3. A conveyance of a dam and mill races or canals and the water power furnished by the dam, reciting that it was intended thereby to convey the entire interest of the grantor in all said property, carried the grantor's title to the fee of the bed and banks of the canals, including a lock, and not a mere easement to use the same for water-power purposes; and upon discontinuance of the use of the lock it did not revert to the grantor.

APPEALS from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on that of the defendant.*

This is an action of ejectment brought to recover possession of a parcel of land formerly used as a lock for the passage of boats from a point above the dam in the Fox river at Neenah to Little Lake Butte des Morts. The lock in question fell into disuse after the year 1862, when the government of the United States constructed a channel for the passage of boats on the Menasha side of the river. The lock was gradually filled up from 1884 to 1890. Other material facts are stated in the opinion. The circuit court held that the plaintiff was entitled to a one-third interest and the defendant to a two-thirds interest in the strip of land in question. Both parties appealed from the judgment.

For the plaintiff there was a brief by *Eaton & Eaton,* attorneys, and *Barbers & Beglinger,* of counsel, and oral argument by *Fred Beglinger* and *M. H. Eaton.*

For the defendant there was a brief by *Hooper & Hooper,* and oral argument by *Moses Hooper.*

BARNES, J. This being an action of ejectment the plaintiff must prevail, if at all, on the strength of its own title, not

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upon the weakness of that of its adversary. The plaintiff claims title. So does the defendant. Both claim through a common grantor. Defendant also asserts that, if the title is not vested in it, it is vested in a third party not before the court. It is not material for the decision of this case where the title is, provided it is not in the plaintiff.

On March 14, 1870, James Bassett and Abigail Bassett executed a quitclaim deed of the lock in dispute to Hungerford and Daniels, through whom the plaintiff claims by mesne conveyances. It is the contention of the plaintiff that at the time this deed was executed the Bassetts owned a two-thirds interest in the lock. On September 18, 1867, the same grantors executed a conveyance to Smith and Proctor, conveying the following described property:

"The dam across the south channel of the Fox river at the village of Neenah in said county, commonly known as the 'Neenah dam,' erected and maintained pursuant to the provisions of an act of the legislature of Wisconsin entitled 'An act to authorize the construction of a dam across the Fox river,' approved February 8, 1847, with the right, privilege and easement of the land occupied by the ends of said dam on each side of said channel for the uses and purposes of keeping and maintaining the said dam, also all the right, title and interest of the said parties of the first part in and to the water held and water power created by said dam, excepting as hereinafter expressly reserved, and to the land occupied or to be occupied by the canal and race used for carrying the water from said dam to the mills and manufactories in said village of Neenah according to the recorded plat of Bassett's addition to Neenah to the width of one hundred feet each as specified in said plat."

It is the contention of defendant that an undivided two-thirds interest in the lock passed under this conveyance. The plaintiff did not succeed to any interest conveyed to Smith and Proctor. If the lock in question was conveyed by that deed, then plaintiff has no title to an undivided two-thirds interest therein. If it was not so conveyed, such interest be-

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longs to the plaintiff. The trial court held that the foregoing deed conveyed the interest of the grantors in the lock and that plaintiff never acquired any title to the two-thirds interest conveyed under the deed of March 14, 1870. The map on page 429 shows the location of the dam, main channel of the river, the water power, canal, the race, and the lock.

Harvey Jones, Gilbert Jones, and Abigail Bassett were the heirs at law of Harvey Jones, Sr., and are the common grantors of all persons claiming title to the land in controversy. In 1847 (Terr. Laws 1847, p. 104) the legislature of Wisconsin empowered Harvey Jones to erect the dam in question. That act provided:

"Said dam . . . shall contain a suitable and convenient lock . . . for the passage of boats, barges and water craft; and the proprietor of said dam shall maintain said lock and shall attend the passage of all such boats, barges and water craft through said lock free of all charges to the owners thereof; and if such lock shall not be kept in repair . . . and suitably attended . . . said Harvey Jones and his associates, their heirs and assigns, being in possession of the works hereby authorized, shall pay to any person or persons who may be injured by delay all damages . . ."

The lock was completed some time after 1849, and was operated in connection with the dam from the time of its completion until 1862, when the government canal was built, which has ever since been used for the passage of boats. After the erection of the canal by the federal government the Jones lock fell into disuse, and from 1884 to 1900 it was gradually filled up.

It will be observed that the Bassett deed of September 18, 1867, conveyed (1) the dam across the south channel of the Fox river, known as the "Neenah dam," together with an easement over the land occupied by the owners of the dam for the purpose of keeping the same in repair; (2) all right, title, and interest of the grantors in and to the water held and water power created by said dam, with certain exceptions not here material; and (3) the land occupied or to be occupied by the

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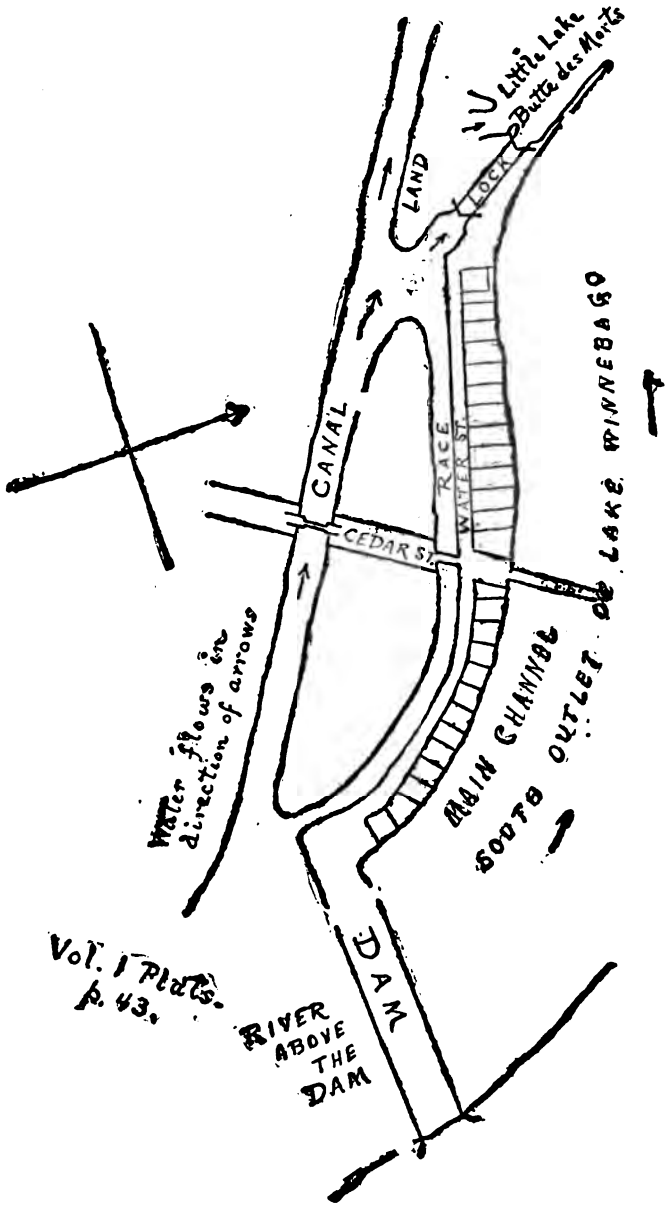

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canal and race used for carrying water from said dam to the mills and manufactories of Neenah to the width of 100 feet, as specified in said plat.

The trial court held that the provision of this deed conveying the canal and race was broad enough to and did include the lock, because the lock was in reality a part of the canal. In opposition to this view counsel for plaintiff urge that there was no physical connection between the lock and the canal; that the canal and race were specifically named in the conveyance, and if it had been the intention to convey the lock it would have been specified; that it was only the canal and race, carrying water for power purposes and manufacturing establishments, that were conveyed by the deed; that the lock had fallen into disuse at the time the conveyance was made; and finally, that the width of the race and canal described in the conveyance was correctly stated as 100 feet, while the lock was only thirty-five feet in width. If the lock was a separate and distinct entity, completely dissociated from the canal, dam, race, and water power created thereby, at the time the conveyance of 1867 was made, the position of the plaintiff, that it was not conveyed with the canal and race, is unanswerable. The canal and race were specifically mentioned; the lock was not. Their width was set forth as being 100 feet, while the lock was but thirty-five feet wide. The only canal described was one used for carrying water for hydraulic purposes. The lock proper had never been used for any such purpose, although the upper part of the canal or channel in which it was located had been so used. If, however, the lock was actually a part of the canal, then it was conveyed. When the improvement authorized by the legislature was completed, the dam, the race, the canal, and the lock were all necessary to the development of the water power. The lock was necessary because the legislature would not permit navigation to be obstructed by a dam unless suitable provision was made for the passage of boats. It is true that in 1867 the lock had not been used for this purpose for about five years because of the

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improvement made by the general government. It is also true that the lock had been maintained up to that time, and for a long time thereafter, and the state in all probability might compel its maintenance now, for that matter, or require the construction of a new one in its stead. The word "lock" does not seem to be defined by the compilers of law dictionaries and is not found in Words and Phrases. Recurring to the definition given by lexicographers we find the following:

"A barrier to confine the water of a stream or canal; an inclosure in a canal, with gates at each end, used in raising or lowering boats as they pass from one level to another." Cent. Dict.

Webster gives the same definition, and that given in the Standard Dictionary is not materially different.

The main thing here is to arrive at the intention of the grantors as expressed in the deed. A lock is almost invariably used in connection with a canal and forms part of it. It cannot exist except in connection with a canal or some equivalent situation. The words "used for carrying water," etc., found in the conveyance we are considering, do not limit the word "canal" as found therein, but are merely descriptive of the identity of the particular canal meant to be conveyed. From the situation as it appears to us the canal and race conveyed begin immediately above the dam, and the canal includes the passageway for water through the locks, as well as through what might be termed the canal proper. In other words, the artificial channels that divert the water from the river at the dam and turn it into the river below the dam constitute the canal. The rights of the parties under this deed of conveyance must be fixed as of the date upon which it was made, and the subsequent filling up of the canal could not operate to divest any title acquired under the deed of 1867.

Another consideration that confirms the view taken is the fact that the arm of the canal leading to the lock had for many years been one of the canals or races leading to a flour mill operated by water power. It is true the lock was beyond such

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mill, but a portion of the canal above the headgates had been used for the dual purpose of furnishing power and serving as a channel for the passage of boats. Without the use or control of the locks the water power conveyed might be largely impaired. The gates of the lock, or at least one of them, had to be kept closed when not in use, in order to conserve the water and prevent its waste. If this lock had been more directly connected with the canal it would not be seriously claimed that it was not a part of it. Considering its utility for holding and utilizing the water for hydraulic purposes and that it originally constituted a necessary component part of the water-power plant, absolutely requisite to its construction in the first instance and to its maintenance for some time thereafter, and the further fact that the owner of such water power might long after the year 1867 be compelled to operate such lock or else to construct and operate a new one, we conclude that the circuit court was correct in holding that a two-thirds interest in the lock passed by the conveyance of September, 1867.

The plaintiff claimed title to the remaining one-third interest in the lock under a quitclaim deed from Gilbert Jones dated March 20, 1893. The defendant contends that at this time Gilbert Jones had no interest in the lock, by reason of a conveyance executed by him on February 19, 1881, to the defendant, which conveyed "all and singular the undivided one-third of the Neenah dam and appurtenances and dam landings and the two mill races or canals at Neenah and the water power or hydraulic power furnished by said dam, it being intended hereby to convey the entire interest in all said property which descended to said Gilbert C. Jones from Harvey Jones and which has not heretofore been sold and conveyed, . . ." with certain reservations not material. The trial court held that the Gilbert Jones interest in the lock did not pass under the deed of February 19, 1881, and that plaintiff acquired title thereto under the deed of March 20, 1893. It will be observed that the deed of 1881 conveyed a one-third

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interest in the dam and appurtenances and a like interest in and to the two mill races and canals and the water power furnished by the dam. The deed then recites that it was the intention of the grantor to convey his entire interest in all of said property. The circuit court held that this conveyance did not carry a fee in the lock, but simply an easement to carry water through and to operate the same, and that when the lock was no longer used for the purpose for which it was intended it reverted to the grantor, and that plaintiff acquired title thereto from such grantor under the deed of March 20, 1893. The only material difference between the recitals in this deed and the one under which the two-thirds interest was held to be conveyed was that the 1881 deed did not specifically convey the land occupied by the race, while the other deed did. The conveyance of the canal having included the lock, it is apparent that the court overlooked the provision of the deed whereby the grantor expressed his intention "to convey the entire interest in all of said property" which he then owned. The grantor owning the land which necessarily was an essential part of the canal, such entire interest would as a matter of course include the fee and not a mere easement. Moreover, we think that a conveyance of a mill race or canal carries something more than an easement or right to use the same for water-power purposes. The bed and banks are part of the canal and should pass with the conveyance of it. *Bishop v. Seeley,* 18 Conn. 389, 394; *Schuylkill N. Co. v. Berks Co.* 11 Pa. St. 202, 203; *Genesee Valley C. R. Co. v. Slaight,* 49 Hun, 35, 1 N. Y. Supp. 554. It follows that the trial court erred in holding that the plaintiff was the owner of and was lawfully entitled to the possession of the one-third interest in the lock.

There is still a third conveyance, under which the defendant claims title to the southwesterly one-half of the lock, which was executed May 13, 1865, and ran from Gilbert C. Jones and Willard Jones to Abigail Bassett. In view of the

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conclusion reached in reference to the other deeds it is unnecessary to consider this one. The court below found that it conveyed title to the southwest boundary line of the lock and not to the center of it, and we think the trial court was right in reaching this conclusion.

The title to certain other parcels of land is in controversy in this action, but no complaint is urged as to the disposition made of such lands by the circuit court, and as to them the judgment should stand.

By the Court.—The judgment of the circuit court is affirmed on plaintiff's appeal, and is reversed on the appeal of the defendant, and the cause is remanded for further proceedings according to law.

KERWIN, J., took no part.

JACOBSEN, Appellant, vs. WHITELY and others, Respondents.

February 19—March 9, 1909.

Deceit: Reliance on statements: Knowledge of falsity: Evidence: Nonsuit: Sale of corporate stock: Election between remedies: Rescission: Ratification: Witnesses: Redirect examination.

1. An action for deceit cannot be maintained by one who acted blindly upon statements whose falsity he knew or by the exercise of ordinary observation would have known; but it is not essential that the person claiming to have been misled should have met every positive statement with incredulity and have made search to ascertain whether it was false.
2. In determining whether the falsity of statements was obvious the intelligence or acuteness of the plaintiff and the extent to which he relied upon defendant by reason of acquaintance or confidence are matters to be considered.
3. In an action for deceit in the sale of shares of stock in a dry goods company doing a retail business, the evidence—showing, among other things, that defendants were long-time acquaintances of plaintiff, that he had no adequate opportunity for the

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examination necessary to an understanding of the books of the company, and that the action of defendants was such as to divert him from such examination—is *held* not to justify a nonsuit on the ground that, by the exercise of ordinary care and observation, plaintiff should have known the falsity of defendants' statements as to the assets, debts, business, and earnings of the company.

4. One who has been induced by fraud to purchase property may elect not to rescind the contract but to retain what he has received and recover damages for the deceit; and such right of recovery is defeated by no lapse of time less than that prescribed by the statute of limitations.
5. In an action for deceit in the sale of stock in a corporation, a financial statement with which defendants were not shown to have been connected was not admissible to corroborate the charge of specific fraud.
6. Upon redirect examination of a witness anything fairly explanatory of that which was drawn out on cross-examination is proper.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action for damages from deceit. The plaintiff claimed that he was induced to buy capital stock at par to the amount of $3,000 in the Topliff Dry Goods Company, a corporation of this state, by fraudulent representations of the defendants to the effect that said company was doing a prosperous business, that its business was in a flourishing condition, that for the year 1904 it made a net profit in its business of over $4,000, and that the amount of its indebtedness was about $19,000 and its assets about $50,000: all with intent to induce plaintiff to buy said stock. Evidence was introduced of the making of said representations, of the material falsity thereof, of the extent of opportunity and ability of the plaintiff to ascertain such falsity before the purchase of said stock, and also a large amount of testimony of his opportunity to learn the same after he had purchased it and before commencing suit, during a part of which period he continued in the employ of said corporation at $25 per week, and was also a director and stockholder therein. The making of fraudulent

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representations was also put in issue both by the pleadings and the evidence. At the close of the trial the court entered judgment of nonsuit, from which the plaintiff appeals.

For the appellant there was a brief by *Williams & Williams,* and oral argument by *G. E. Williams.*

For the respondents there was a brief by *Thompsons, Pinkerton & Jackson,* and oral argument by *J. C. Thompson.*

DODGE, J. As this case went off on nonsuit at the close of the plaintiff's evidence, it is only necessary to inquire whether there was any credible evidence which, taken with all intendments and reasonable inferences most favorably to the plaintiff, tended to establish the cause of action. It is undeniable that there was evidence that the defendants represented to the plaintiff that the corporation had assets of about $50,000; that its debts were only about $19,000; that it was doing a prosperous business and earned a substantial profit the preceding year; also that each of those statements was false, that plaintiff relied upon them, and that the stock purchased was of less value than if the facts stated had been true. Materiality of such representations to the making of the contract cannot well be doubted. We presume, however, the court's reason for entering the nonsuit was, as counsel for respondents argues, that plaintiff had full opportunity for knowing the falsity of the representations made to him before he purchased and therefore could not and did not rely upon their truth.

The rule of law is well established that a purchaser is not justified in relying upon the statements of the seller when their falsity is obvious to him, but this does not require that he shall meet every positive statement with incredulity and must search to ascertain whether it is false. The law recognizes the duty of each to refrain from even attempted deceit of another with whom he deals, and the right of the latter to assume that he will do so. It is an unsavory defense for a

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man who by false statements induces another to act to assert that if the latter had disbelieved him he would not have been injured. *McClellan v. Scott,* 24 Wis. 81, 86; *Tyner v. Cotter,* 67 Wis. 482, 491, 30 N. W. 782. Nevertheless courts will refuse to act for the relief of one claiming to have been misled by another's statements who blindly acts in disregard of knowledge of their falsity or with such opportunity that by the exercise of ordinary observation, not necessarily by search, he would have known. He may not close his eyes to what is obviously discoverable by him. *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932, and cases there cited; *Miller v. Hackbarth,* 126 Wis. 50, 52, 105 N. W. 311. It is in this sense only that opportunity to know the truth will prevent recovery for deceit. Whether the situation presents or fails to present such opportunity is usually a question of fact. The intelligence or acuteness of plaintiff is one important element. *Barndt v. Frederick,* 78 Wis. 1, 11, 47 N. W. 6; *Bowe v. Gage,* 127 Wis. 245, 246, 106 N. W. 1074. Another, is the reliance reposed by the buyer on the seller by reason of acquaintance or confidence. These and many other considerations have proper effect in deciding whether the truth was obvious, as appears in the various cases already cited and very many others. *Lockwood v. Allen,* 113 Wis. 474, 89 N. W. 492; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Mannel v. Shafer,* 135 Wis. 241, 115 N. W. 801; *King v. Graef,* 136 Wis. 548, 117 N. W. 1058.

In the light of these principles, let us examine the evidence, at least in its tendency. The opportunities claimed to have been enjoyed by the plaintiff from which, it is asserted, he must have known of the falsity of the statements made to him, are a visit to the store, with opportunity to observe the stock in trade and to examine the books. With reference to the first, we think it entirely open to inference whether mere observation of a dry goods store which, according to defendants'

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evidence, contained from $38,000 to $40,000 worth of varied stock, would have made obvious to the plaintiff the impossibility of the total assets of the company equaling $50,000. We apprehend that no one, without a careful examination of how boxes and drawers were filled, and whether with the more or less valuable kinds of stock, could form even an estimate within twenty-five per cent. of the fact; besides which, of course, such observation would give no light whatever on the amount of the accounts receivable, which were outstanding and which of course constituted assets.

As to the books which were in evidence, they are a voluminous set of double-entry books, covering all the details of purchases from day to day and of petty sales in a retail business. They consist of a ledger of nearly 600 pages, containing approximately 450 different accounts, several of which extend over many pages, not consecutively, but scattered throughout the book, without complete reference to each page in any index. The books and designation of the general accounts of the business are highly artificial and capable of giving or withholding information according as the examiner was familiar with the system of bookkeeping and also with the key to the exact meaning of the several accounts. For example, the merchandise account was closed in January, 1905, with an entry indicating a gross profit on merchandise of some $9,000. Of course a skilled bookkeeper would have understood that this apparent profit was subject to various deductions, but primarily for expense. Had he turned to the expense account he would have found that to amount to but $2,600, but he would have not discovered that various classes of expenditures were not included under the caption "expense:" such as salaries and wages, insurance, advertising—each of considerable amount. Thus, unless familiar not only with the theory of double-entry bookkeeping but with the meaning in which the bookkeeper used the titles to the accounts, he might have been deluded into an understanding

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that much profits had been made. True, the profit and loss account would not have shown any net profit, but in order that he must be charged with notice of the profit and loss account it must appear that he had knowledge of any such general balancing account, which by the way is usually a characteristic of double-entry bookkeeping, in form at least. Two of the witnesses most familiar with these books testified that while the facts might have been learned from them, they were apparent only to a skilled bookkeeper,—to him only after sufficient critical examination to master the individual peculiarities. There was evidence that the plaintiff possessed no such skill; that he had no familiarity at all with double-entry bookkeeping or with its theory; that in his work as a dry goods clerk he had learned how to refer to certain accounts upon other sets of books, but nothing more. It seems to us, therefore, that the jury might well have drawn the conclusion that these books presented to him an incomprehensible maze of figures without meaning or significance, such as to blind rather than enlighten.

One item upon which defendants dwell is the "bills payable" account, which, if understood, would have shown an adverse balance of between $21,000 and $22,000, which they claim, with the verbal information to plaintiff that there was $9,000 of indebtedness in addition to bills payable, as the fact apparently was, at once informed him that the indebtedness was as much as the fact, $32,000. But here, again, a key to the bookkeeper's terminology was essential to any such deduction. What did bills payable mean? Did it include or exclude bills owing to wholesale merchants for goods? The representation to plaintiff was that $10,000 was owing to the bank and about $9,000 to such merchants. The total of $21,000 of the bills payable account would not be violently variant from the total, and on the page on which he must have looked it would have been apparent to a bookkeeper that at least one $3,000 item included in that account represented in-

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debtedness to J. V. Farwell & Co., well-known wholesale merchants; thus justifying an idea that the total covered not only indebtedness to the banks, but also indebtedness to merchants.

There is also evidence tending to prove that the only time when plaintiff sought to avail himself of the offered privilege of examining the books, he was accompanied to the store on a Sunday by one of the defendants, who spread certain books upon a desk and then told him that he knew nothing about the bookkeeping and could not explain its meaning, whereby plaintiff was unable to gain any information therefrom. The only other actual exhibition of books was made on an evening when plaintiff was called to the store by telephone just as he was retiring for the night. Books were spread upon the table, but all three defendants were present and entered into various discussions with plaintiff and with each other as to the details of an arrangement by which he should come into the corporation, the extent to which his name might be helpful, and to which he should, for the welfare of the concern, have managerial prominence. We think on both occasions there was evidence from which the jury might have well believed not only that no adequate opportunity for the examination necessary to the understanding of the books was enjoyed by plaintiff, but that the action of the defendants was such as to divert him therefrom.

To the foregoing facts may be added the consideration that the defendants were all long-time acquaintances of the plaintiff, some had been his fellow-workmen many years before, and a considerable intimacy of friendship had been maintained between them for a long time. Under such circumstances it has often been held that a positive assertion of a fact by the proposed seller may be thought by the trier of facts a sufficient diversion of the purchaser from availing himself of quite obvious opportunities for examination. We cannot avoid the conviction that the inference as to whether or not the falsity of the alleged misrepresentations was so apparent to the plaintiff that he must have known it by the exercise of that

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care and observation which a person of ordinary care, of equal intelligence and understanding, would have exercised, was one for the jury, and that error was committed in granting the nonsuit.

Some contention is made by respondents that plaintiff, by retaining his stock and continuing in the employ of the company, as contemplated at the time of the purchase, after he must have ascertained the falsity of the representations, has so ratified the contract, or waived right to complain of the fraud, that he cannot recover. This seems to evince much confusion in the minds of the respondents' counsel as to the rights of one induced to make and execute a contract by deceit or false warranty. Under such circumstances the defrauded purchaser has at his election either of two rights: He may rescind the whole contract, and upon returning all that he has received may recover back all that he has paid, so that the parties may stand *in statu quo*. To this right it is doubtless essential that he act with reasonable promptness, and that enjoyment of rights under the contract will be deemed a waiver. He also has, however, the right to enjoy all the fruits of what he receives under the contract and to recover damages by reason of breach of warranty or deceit for whatever the property is in fact worth less than it would have been if as represented. *Bonnell v. Jacobs,* 36 Wis. 59; *Parry Mfg. Co. v. Tobin,* 106 Wis. 286, 82 N. W. 154; *Waupaca E. L. & R. Co. v. Milwaukee E. R. & L. Co.* 112 Wis. 469, 472, 88 N. W. 308; *Smeesters v. Schroeder,* 123 Wis. 116, 101 N. W. 363; *Palmer v. Goldberg,* 128 Wis. 103, 107 N. W. 478; *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669. This latter right, when he does not rescind, is absolute and destroyed by no lapse of time less than that prescribed by the statute of limitations. The plaintiff here has done nothing more than to retain all that he got under the contract, and is entitled to recover that which he would have received if facts falsely represented by defendants had existed.

As to the rulings on evidence, we need not decide whether

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there was reversible error. We think the redirect examination of plaintiff as to what transpired before the commissioner when his deposition was taken under sec. 4096, Stats. (1898), was somewhat restricted, and yet the court evidently recognized the true rule of law that anything fairly explanatory of that which had been drawn out on cross-examination was proper. He was equally correct in the view that a certain so-called financial statement with which the defendants were not shown to have been connected was not proper to go to the jury to corroborate the charge of specific fraud.

The remaining question as to competency of plaintiff's wife as a witness is not likely to arise in the same form upon a new trial, and we therefore forego discussion thereof.

By the Court.—Judgment reversed, and cause remanded for a new trial.

RANKEL, Appellant, vs. BUCKSTAFF-EDWARDS COMPANY, Respondent.

February 19—March 9, 1909.

Master and servant: Injury to servant: Independent contractor: Negligence of fellow-servant: Care in selection: Who are fellow-servants: Assumption of risk: Duty to warn servant of dangers.

1. One H. was employed by defendant at a certain compensation per day to procure the necessary workmen and attend to the construction of a mill, defendant to furnish all materials and to pay, through H., the men hired by the latter. Defendant exercised a control over the undertaking to the extent of directing its progress, course of procedure, and general management. *Held*, that H. was not an independent contractor, and that the workmen were employees of defendant.
2. A master is not liable for injuries to a servant caused by negligence of a fellow-servant, if he used reasonable care in selecting the fellow-servant for the work in question, acting upon such information as to his skill and competency as ordinarily prudent men act upon under the same or similar circumstances.

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3. The evidence in this case is *held* to show that defendant was not negligent in the selection of a servant to break up with dynamite the frozen ground where a mill was to be built.
4. One employed for the special work of breaking up with dynamite the frozen ground where a mill was to be erected was not a fellow-servant of a workman engaged in excavating the earth who, beyond assisting in driving the holes in which the charges of dynamite were placed, took no part in the separate and distinct operation of blasting; and the common master is liable to such workman for injuries resulting from negligence of the blaster. *Wiskie v. Montello G. Co.* 111 Wis. 443, distinguished. MARSHALL, J., dissents.
5. The workman in such a case who, after the blaster had pronounced the place safe for continuing the work of digging, was injured by striking with his pick an unexploded charge of dynamite, is *held* not to have been informed of or to have had reason to apprehend the particular danger, so as to be chargeable with assumption of the risk.
6. It is the duty of a master using hazardous agencies in the conduct of his business to warn his servants, not informed on the subject, of the extraordinary risks attending such use.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This is an action for the recovery of damages for personal injuries alleged to be due to the negligence of the defendant.

The defendant conducts a manufacturing plant for the production of chairs, caskets, etc. In 1907 it was determined to add a sawmill to the defendant's plant. The mill was to be built upon a marshy ground into which spiles were to be driven as a foundation for the structure. The construction of the sawmill required the removal of certain old structures as well as the building of the new one. The defendant company negotiated with one Heidlinger for the removal of the old structures and the construction of the new mill. Heidlinger stated that he could not figure upon the work and undertake it because it involved the destruction of the old and the construction of the new structures, and they arranged that Heidlinger was to receive $5 per day for his time and services. He was to procure whatever workmen might be needed,

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keep account of their time and their wages, present defendant with a statement showing the amount of money needed to pay the wages of such workmen, receive this amount with his own wages from the defendant, and therefrom pay the men. All the materials to be used in the construction were to be furnished by the defendant. Heidlinger prepared the plans for the mill. The work was started in the early part of the year, when the surface of the ground was frozen to the depth of about two feet. It was necessary to remove the frozen earth in order to be able to drive the spiles for the foundation. Heidlinger procured laborers to excavate and remove the frozen earth, among them the plaintiff. For a few days they worked with crowbars, picks, and shovels. To expedite the work Heidlinger consulted with an officer of the defendant and suggested that the frozen earth might be removed more rapidly and easily if it were broken with dynamite. The officer desired to send for dynamite, but Heidlinger stated that he did not know anything about dynamite and how to set and explode it. He was then directed to consult the owner of a stone quarry outside the city of Oshkosh in order to procure a competent man to do the blasting. Heidlinger consulted the owner of the quarry, and on his recommendation engaged a man in his employ, one Spanbauer, to do the blasting. Spanbauer had worked for the owner of the quarry for five or six years at breaking stone. He had observed the way in which blasting was done at the quarry and had done some blasting there.

Preparatory to the blasting of the frozen earth the workmen engaged in breaking up the ground drove an iron bar into the ground with a sledge hammer. When the iron had been driven into the ground to the desired depth the bar was withdrawn and the workmen retired and took no part in the blasting operation. Spanbauer was the only man at work on the grounds of the defendant who had had any experience with dynamite, and when the hole had been made he charged it by placing the dynamite in the hole, placing the exploding

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cap on it, making the necessary electrical connections, filling the hole with earth and tamping it down, and he then exploded the charge. Several charges of dynamite were exploded at the same time by having a series of charged holes connected with the one electrical instrument used to discharge the exploding caps. Four charged holes were connected for the last blast made by Spanbauer. About one of the holes the earth was not thrown up as about the other three, and Spanbauer then again connected the wires from this hole with his electrical apparatus and ran a current through the wires. No explosion followed, and Spanbauer made an examination of the ground in the vicinity of the hole and saw a crack about one and one-half feet from the hole. He attributed the crack to the supposed explosion of the charge in the hole, and told the men to proceed with the digging, that everything was all right. Subsequently plaintiff while working in this vicinity struck the unexploded charge of dynamite with a pick, and by the ensuing explosion lost the sight of both his eyes and suffered other injuries.

There was evidence in the case that a careful workman, with a knowledge of how to blast in frozen ground, in case of doubt as to whether or not a charge had been exploded, with a wooden spoon would carefully remove the earth which had been tamped into the hole and thus assure himself that the charge had been exploded. When several charges of dynamite are discharged by the same electrical discharge the several explosions occur simultaneously, and it is impossible to tell from the sound whether all have been exploded.

At the conclusion of the plaintiff's evidence the court refused to grant a nonsuit, but at the conclusion of the defendant's testimony the court directed a verdict for the defendant on the ground that the plaintiff was not in the employ of the defendant at the time of the injury and because the plaintiff was a fellow-servant of the blaster, Spanbauer. This is an appeal from the judgment on the verdict as directed.

For the appellant there were briefs by *Eaton & Eaton,* at-

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torneys, and *H. B. Jackson,* of counsel, and oral argument by *M. H. Eaton* and *H. B. Jackson.* To the point that Spanbauer and the plaintiff were not fellow-servants, they cited, among other cases, *Schultz v. C., M. & St. P. R. Co.* 48 Wis. 375, 379; *Grams v. C. Reiss C. Co.* 125 Wis. 1; *Smith v. C., M. & St. P. R. Co.* 42 Wis. 520; *Promer v. M., L. S. & W. R. Co.* 90 Wis. 215; *Cadden v. Am. S. B. Co.* 88 Wis. 409; *McMahon v. Ida M. Co.* 95 Wis. 308; *North Chicago R. M. Co. v. Johnson,* 114 Ill. 57; *Salmons v. N. & W. R. Co.* 162 Fed. 722.

For the respondent there was a brief by *Williams & Williams,* attorneys, and *Barbers & Beglinger,* of counsel, and oral argument by *G. E. Williams, Fred Beglinger,* and *Charles Barber.* They cited, besides other cases, *Wiskie v. Montello G. Co.* 111 Wis. 443; *Okonski v. Pa. & O. F. Co.* 114 Wis. 448; *Hamann v. Milwaukee B. Co.* 127 Wis. 550; *Gereg v. Milwaukee G. L. Co.* 128 Wis. 35; *Dahlke v. Ill. S. Co.* 100 Wis. 431; *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338; *Williams v. North Wis. L. Co.* 124 Wis. 328; *Alaska M. Co. v. Whelan,* 168 U. S. 86; *Petaja v. Aurora I. M. Co.* 106 Mich. 463.

SIEBECKER, J. The plaintiff challenges the correctness of the trial court's ruling as to all the questions involved in directing a verdict for the defendant. We will examine them as presented.

The first contention is that the plaintiff was in the employ of the defendant as its servant at the time of the accident. This is denied by the defendant, and it asserts that he was in the employ of one Heidlinger, who, it claims, had contracted to erect the mill for the defendant. The facts adduced establish that Heidlinger was employed by the defendant to attend to the construction of the mill, the defendant to pay him a compensation at the rate of $5 per day for the time he was so engaged. It also appears that the defendant was to fur-

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nish all the materials for the structure and for the preparation of the grounds, and that it was to pay the daily wages of all the men needed in erecting the structure. The men were hired by Heidlinger, and he took account of their time and presented it to the defendant's officers, received the amounts due him for wages and due the men whom he had engaged, and paid them, retaining out of the sum so paid him by the defendant the amount due him as compensation for his time at the rate agreed upon by him and the defendant. It is also shown that the defendant's officers exercised a control over the undertaking to the extent of directing its progress, course of procedure, and general management. The evidence does not establish that defendant and Heidlinger agreed that Heidlinger was to have the right to control the erection of the structure and was to be responsible for the cost of the work and the wages of the men employed. It is manifest that the defendant was responsible to all persons engaged on the job, and that Heidlinger merely acted as its agent in securing their services. Under these circumstances it cannot be said that Heidlinger had contracted with defendant to erect the mill according to his own method and without being subject to the control of the defendant except as to the result of the work. Upon the evidence it must be held that the plaintiff was in defendant's employ at the time of the accident. From the foregoing conclusion it follows that Spanbauer was in defendant's employ when he was conducting the operation of blasting the earth at the mill site.

We are persuaded that the defendant exercised reasonable care in selecting Spanbauer as one competent to do the blasting. Whether or not Spanbauer proved to be competent to perform this highly dangerous service does not determine this question. The inquiry is: Did the defendant act upon such information respecting Spanbauer's skill and competency in this regard as that upon which ordinarily prudent men will act under the same or similar circumstances? If so, it ful-

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filled its measure of duty to its other servants in the selection of employees. It is shown that Heidlinger apprised the defendant's officer in charge of the construction that he had not the knowledge and skill to set the loads of dynamite and explode them. Thereupon he was directed by defendant to obtain for this purpose a competent blaster from among the men engaged in this service in a neighboring quarry. Pursuant to this direction Heidlinger applied to the person operating the quarry, and was informed that Spanbauer was engaged at the quarry and understood the business. It is manifest that the officers of the defendant and Heidlinger knew that persons were engaged in blasting in the quarry, and understood from the representations of the person operating that Spanbauer had performed this service and was skilled in it. Their conduct in this respect was that of reasonable and careful men and acquits them of the charge of negligence in this respect.

It is insisted by respondent that, if the plaintiff was in defendant's employ in performing the service at which he was injured, then defendant is not liable therefor, because it was caused by the negligence of Spanbauer, who was a fellow-servant of the plaintiff in the work of blasting. The trial court held this contention of the defendant to be sustained by the facts of the case under the ruling in *Wiskie v. Montello G. Co.* 111 Wis. 443, 87 N. W. 461. In the *Wiskie Case* the plaintiff, while assisting the foreman of the quarry in conducting the blasting, was injured through the unexpected explosion of part of a powder blast which the foreman had negligently permitted to remain and near which he had set the plaintiff at work. The facts of the case show that Wiskie and the foreman had jointly placed the blast, that they worked together under the foreman's direction at raising and blasting rocks, and that they had been so engaged for a long time before the accident. It was held upon these facts that Wiskie and the foreman were engaged in a common service

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of blasting rocks when Wiskie was injured. From an examination of the facts in that case it is manifest that Wiskie and the foreman were jointly performing the same task and were engaged in a common service; but we do not find a like state of facts in the instant case. Here the defendant had employed the plaintiff to help remove the earth for the foundation of the mill. The defendant in the course of the prosecution of such work decided to employ a blaster to break the frozen ground so as to expedite the work. Spanbauer was engaged for this purpose and was employed at this special work for two days. The work was conducted as follows: Plaintiff and the other workmen at the excavation drove holes with iron bars into the earth for setting dynamite charges in. Spanbauer then took charge of the work. He placed the dynamite charges in the holes, packed them with earth, connected them by wire with an electric battery, and discharged them by turning on the electric current. Neither the plaintiff nor the other workmen took part in setting and packing in the charges or in connecting them by wire with the battery or in discharging them. All of this was under the control of and was performed by Spanbauer in the capacity of blaster. From this it appears that the setting and exploding of the blast was exclusively intrusted to the expert and that plaintiff took no part in performing this service. It is obvious from the dangerous character of this service that it was treated as separate and distinct from the service plaintiff and the other workmen were performing in excavating the earth for the foundation of the mill. In the *Wiskie Case* the plaintiff assisted the expert in performing the work of blasting. In the instant case the plaintiff did not assist or engage in the work of blasting, and herein the two cases are widely distinguished. In the former the plaintiff and expert were engaged in the common service of blasting. In the latter the plaintiff and the expert were engaged in separate and distinct services, which were different in nature and in the hazards and dan-

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gers incident thereto. True, they both served a common master and occupied the same place while performing their respective duties, but the operation of blasting was wholly different, distinct, and independent of the employment of the excavator engaged in the construction of the mill. The risks and dangers of blasting are not ordinarily incident to the service plaintiff was performing. These features and conditions of the instant case clearly differentiate it from the *Wiskie Case.* Upon these considerations the ruling of the trial court that plaintiff and Spanbauer were fellow-servants cannot be approved. The case must be treated from the standpoint that plaintiff was the servant of the defendant and was not engaged in the operation of blasting with Spanbauer, who acted alone for the defendant in using and handling highly explosive and dangerous agencies for blasting the earth. *Cadden v. Am. S. B. Co.* 88 Wis. 409, 60 N. W. 800.

Nor can the plaintiff be treated as one informed of the dangers which are incident to the want of a proper conduct of the blasting operation. The nature of plaintiff's work and his relation to the blasting did not inform him of the unsafe condition of the place where he was directed to proceed with the work of excavating after Spanbauer had exploded the blast and had pronounced the place safe for continuing the work of excavating. While the plaintiff knew that an explosive was being used by Spanbauer to expedite the work, he was not informed of the particular danger to him from a failure to discharge part of the dynamite charges. He had no reason to apprehend that an undischarged load was hidden in the earth where he was put to work. He was in fact led to believe by the expert that the place was safe.

It does not appear that plaintiff was instructed or warned of the extraordinary hazards and dangers incident to the use of dynamite, and he cannot be held to have assumed the risks thereof as dangers ordinarily incident to his employment. It devolves on the master, who finds it necessary and expedient

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to use hazardous agencies in the conduct of his business, to inform his servants, not informed on the subject, of the extraordinary risks and dangers attending their use, in order that they may avoid them by refusing to continue in the service, or may otherwise protect themselves against them. The evidence in the case bearing on the question of defendant's negligence was such as to present questions for solution by a jury, and it was error to direct a verdict for the defendant.

By the Court.—Judgment reversed, and the cause remanded to the trial court for a new trial.

MARSHALL, J. (*dissenting*). In my opinion this case is clearly ruled in favor of respondent by *Wiskie v. Montello G. Co.* 111 Wis. 443, 87 N. W. 461, and the principle there referred to exempting the master from the consequences to one servant from the negligence of his fellow-servant. The trial judge doubtless supposed, as well in my opinion he might, that there was no fair way of distinguishing the two cases or escaping the effect of the principle.

The logic indulged in, by my brethren, has support in some jurisdictions, but was repudiated by this court at quite an early day, and such repudiation has been uniformly adhered to.

I will say, in passing, that I have not the slightest idea the court now intends to adopt the doctrine which its opinion, as it seems, will be regarded as promulgating. At some future time the apparent departure from the long-traveled road will be corrected.

This case goes upon the theory that employment in a general enterprise may be, or, to put it stronger, is necessarily, divided up into different tasks, services, or departments, according to character, grade, and degree of danger, and that, in the law of negligence, fellowship in one branch of a general employment does not extend to those employed in the other.

How wide the doctrine stated is from the rule prevailing

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in this state, which is so familiar that it hardly need be stated, must be apparent at once.

Neither grade of work, particularity of group, within a broad general class of employees in a particular proprietor's business, nor degree of danger, nor rank of employment, is the test of fellowship between servants, in the law of negligence. The sole test is whether the persons concerned are employed in the same general enterprise to accomplish the same general purpose by the same master under the same general control, regardless of whether they are, at the particular time, engaged in the same branch of the work or not. *Toner v. C., M. & St. P. R. Co.* 69 Wis. 188, 198, 31 N. W. 104, 33 N. W. 433.

A station agent employed in a widely different branch of the business of operating a railroad from a train crew, the latter from a track crew, and that one from the roundhouse crew, all being in the common employment of operating the railroad, the engineer on the locomotive and the most humble trainman, the trackman wielding his shovel, the station agent, the most common workman moving freight about the depot, are fellow-servants. *Toner v. C., M. & St. P. R. Co., supra; Cooper v. M. & P. du C. R. Co.* 23 Wis. 668; *Howland v. M., L. S. & W. R. Co.* 54 Wis. 226, 230, 11 N. W. 529; *Pease v. C. & N. W. R. Co.* 61 Wis. 163, 20 N. W. 908; *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338, 349, 21 N. W. 269; *Albrecht v. C. & N. W. R. Co.* 108 Wis. 530, 84 N. W. 88, 53 L. R. A. 653; *MacCarthy v. Whitcomb,* 110 Wis. 113, 85 N. W. 707. Those cases amply illustrate all I have said. All these are held fellow-servants: A shoveler in a gravel pit and a train conductor. *Naylor v. C. & N. W. R. Co.* 53 Wis. 661, 11 N. W. 24. A snow shoveler and a member of a train crew. *Howland v. M., L. S. & W. R. Co., supra.* The foreman and men engaged under him, whom he has full power to direct. *Peschel v. C., M. & St. P. R. Co., supra.* The track-repair crew and the members of a crew on a passing train.

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Toner v. C., M. & St. P. R. Co., supra. The train crew on one train with the train crew on another. *MacCarthy v. Whitcomb, supra.* The men who load coal on locomotive tenders and the track walker injured by coal dropping from the tender. *Schultz v. C. & N. W. R. Co.* 67 Wis. 616, 31 N. W. 321.

Perhaps as striking an illustration as any case that can be cited is *Cooper v. M. & P. du C. R. Co., supra.* It has been many, many times approved. The person injured, as said in *Heine v. C. & N. W. R. Co.* 58 Wis. 525, 17 N. W. 420, was engaged in a branch of the service not in any way connected with that in which the negligent employee causing the injury was engaged. The particular work of the one had no connection whatever with the particular work of the other, except the two services were in departments of the general business of operating the railroad.

It seems useless to pursue the matter further. Here, at the best for appellant, he was engaged in one branch and the blaster in another of the general business of a common employment of preparing the ground for the foundation of a mill. They came much nearer being engaged in the same particular work, if that was a legitimate test, than the injured and the injurer in any of the cases referred to.

The idea that an industrial operation under an employer is subject to be divided into specific tasks or departments according to kind of work, whether of common or expert character, so as to make corresponding divisions as to fellowship, has no support in our jurisprudence.

Let it be conceded, for the purposes of the case, that the specific work of doing the blasting was delegated wholly to Spanbauer, while the work of making the holes for him to place the dynamite in and of excavating after the blasts were discharged was delegated to others, including appellant. Concede if we may, as my brethren say, that the two kinds of work were widely different, one being of a common and the

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other of an expert character. Also concede, for now, that the particular service of one was distinct from that of the other and that they were different in nature and hazards and dangers. If those features, under the rule prevailing here, suggest want of fellowship, I do not understand the rule.

True, say my brethren, "they [Spanbauer and appellant] both served a common master and occupied the same place while performing their respective duties, but they were engaged in independent employments in the construction of the mill." That is, as I understand it, they were engaged in different tasks of the general work of construction. That concession, within all our cases, instead of indicating want of fellowship indicates right the contrary, as I understand our decisions.

As the opinion goes: 'Plaintiff was the servant of defendant and was not engaged in the operation of blasting with Spanbauer, who, . . . alone, was the blaster,' thus suggesting, as before indicated, that a general employment is divisible into numerous special tasks as to fellowships. Where there is warrant for that suggestion I do not know.

I think the ruling of the learned trial court was right and the judgment should be affirmed.

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PALMER, Administratrix, Respondent, vs. SCHULTZ, Appellant.

February 20—March 9, 1909.

Pleading: Amendment of answer: Discretion: Appeal: Harmless error: Evidence: Opinions: Qualification of witness: Special verdict: Form of questions: Evidentiary matters: Death caused by negligence: Intoxication: Instructions to jury: Defining "ordinary care."

1. In the allowance of amendments to pleadings, especially to answers, a liberal policy should be pursued in furtherance of justice; and ordinarily, where material matter is omitted from an answer by mistake or inadvertence, an amendment should be allowed.
2. In an action for death of one alleged to have been killed by falling, in the nighttime, into an opening where the sidewalk on a viaduct had been torn up by defendant, the allegations as to the time and manner in which decedent met his death were not denied in the answer. At the trial, more than three years after the answer was served, defendant asked leave to amend so as to put such matters in issue. It appeared that the failure to deny those allegations was due to the inadvertence of counsel, but also that prior to service of the answer plaintiff had found a witness who could testify to the facts so alleged; that such witness had been killed about two years later; that plaintiff had relied upon the fact that the averments in question were not denied, and could not now procure any witness to prove the necessary facts if the amendment were allowed. It did not appear that plaintiff was responsible for the delays in bringing the action to trial. *Held*, that the trial court might well have concluded that allowance of the amendment would not be "in furtherance of justice" (sec. 2830, Stats. 1898), and it cannot be said that his refusal to allow it was an abuse of discretion.
3. The admission of evidence as to how long plaintiff's intestate had been dead when found was harmless where there was no denial of the allegations as to the time and manner of his death.
4. A witness shown to have had considerable experience as assistant coroner might testify as to how long a person had been dead when he saw him, the objection that he was not a physician or qualified as an expert going rather to the weight of his testimony than to his competency as a witness.

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5. Questions for a special verdict need not cover mere evidentiary matters, nor is there ordinarily any necessity for reciting evidentiary facts therein.
6. Plaintiff's intestate having been killed by falling through an open space in a viaduct, a question for special verdict, "Was the condition of such open space obvious to a traveler on foot crossing the viaduct from the east side toward such opening, exercising ordinary care?" is *held* to have fairly submitted the phase of contributory negligence sought to be covered by a question proposed by defendant, "Under the conditions as to lights, barriers, guard rails, etc., surrounding or adjacent to the open space, . . . was such opening obvious," etc.?
7. So, also, the question "Was such open space properly guarded at the time of the injury?" accompanied by a charge fully defining defendant's duty to maintain suitable guards, fairly submitted the issue, and it was not error not to submit a proposed question, "Did the defendant fail to exercise ordinary care in leaving the opening . . . in the condition as to lights, barriers, guard rails, etc., in which it was left," etc.?
8. So, also, intoxication of the deceased on the night in question was a mere evidentiary fact tending to establish contributory negligence, and was properly submitted to the jury by a general question on the subject of such negligence, accompanied by proper instruction.
9. A charge defining ordinary care to be "such care as a man of ordinary care and prudence would have used under circumstances like those disclosed in the testimony," is *held*, if inaccurate, not to have been misleading in this case merely because it did not say "such care as a man of ordinary care and prudence would *ordinarily* have used" and did not say "under the same or similar circumstances." But the omission of the word "ordinarily" from the definition may sometimes be misleading.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This action is brought by the plaintiff, as administratrix of the estate of Thomas Palmer, deceased, to recover damages for the death of the decedent, who was her son. The defendant entered into a contract with the city of Milwaukee to construct sidewalks on the Sixteenth-street viaduct in said city, agreeing in such contract to maintain suitable barriers, and to provide lights and watchmen, and to take such other pre-

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cautions as might be necessary to protect life and property. The negligence relied upon was the failure of the defendant to cause proper barriers to be placed adjacent to the open space caused by the removal of about 1,000 feet of the old sidewalk. The trial resulted in a verdict and judgment for plaintiff, from which judgment this appeal is taken.

The defendant assigns the following errors: (1) Receiving the testimony of the assistant coroner of Milwaukee county, to the effect that in his opinion the deceased had been dead for four or five hours when he saw the body. (2) The refusal of the court to grant a nonsuit. (3) The refusal of the court to permit the defendant to amend his answer. (4) The refusal of the court to direct a verdict for the defendant. (5) The refusal of the court to insert divers questions in the special verdict. (6) Erroneous instructions to the jury. (7) The action of the court in answering the first question in the special verdict. (8) The submission of improper questions in the special verdict.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Ryan, Ogden & Bottum,* and oral argument by *Hugh Ryan.*

BARNES, J. The complaint in this action contained the following allegation:

"And said Thomas Palmer, deceased, on the night of the 19th or early morning of the 20th of May, 1904, and while it was still dark, walked from the east side of said viaduct across the roadway for horses, with the intention of going upon the sidewalk upon the west side of said viaduct, and walked into the space or hole left where said sidewalk had been torn up, and fell to the ground some forty feet below and was killed."

The answer denies that defendant neglected to cause proper barriers to be erected, denies that he failed to take suitable measures for the protection of persons walking upon said via-

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duct, and "denies expressly that the death of said plaintiff's decedent was caused by any neglect on his part to provide suitable guards for the protection of life and property, but alleges, on the contrary, that the accident which caused the plaintiff's decedent's death was occasioned by reason of the negligence or carelessness of plaintiff's decedent directly contributing thereto, and that defendant was in no wise responsible through any negligence or carelessness on his part for the death of plaintiff's decedent."

The answer further alleges "that the accident received by him [the decedent] and which caused his death was due to the carelessness or negligence of said plaintiff's decedent himself contributing directly thereto."

That these denials and averments of the answer do not put in issue the allegation of the complaint as to the time and manner in which the plaintiff's decedent met his death seems too clear to admit of serious controversy. The contributory negligence of the decedent, and the lack of negligence on the part of the defendant, are well pleaded; but it is not denied that while it was dark on the night of May 19th, or the early morning of May 20th, the deceased walked from the east side of the viaduct across the roadway for horses, with the intention of going upon the sidewalk on the west side of the viaduct, and that in so doing he walked into a space or hole left by the removal of the old sidewalk and fell to the ground a distance of forty feet and was killed.

One of the errors principally relied upon was the refusal of the court to permit the defendant to so amend his answer as to put in issue the averments of the complaint as to the time and manner in which Thomas Palmer met his death. If the ruling of the trial court in this behalf was not an abuse of sound judicial discretion, then the errors assigned because of the admission of the testimony of the witness Grundmann, and because of the failure of the court to either grant a nonsuit or direct a verdict, are untenable.

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The affidavits filed in support of the motion to amend show that the averments in question were not denied because of the inadvertence of the counsel who prepared the answer, and that the defendant was not responsible for such omission. The administration of the law requires that a policy of liberality be pursued in the allowance of amendments that are in furtherance of justice. This is particularly true of permitting amendments to answers. Ordinarily the plaintiff may discontinue his action and begin over, if the right of amendment is denied, while the defendant is without remedy if leave to amend is refused. *Thorn v. Smith,* 71 Wis. 18, 24, 36 N. W. 707; *Carmichael v. Argard,* 52 Wis. 607, 610, 9 N. W. 470. And ordinarily, where material matter is omitted from an answer by mistake or inadvertence, an amendment should be allowed. *Gregory v. Hart,* 7 Wis. 532; *Vilas v. Mason,* 25 Wis. 310. And it may be an abuse of discretion to refuse to permit a defendant to amend his answer by striking therefrom an admission improvidently made. *Hepp v. Huefner,* 61 Wis. 148, 20 N. W. 923. Numerous other cases mght be cited to show that amendments that are in furtherance of justice should be liberally dealt with by trial courts. *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 503, 82 N. W. 534; *Smith v. Dragert,* 65 Wis. 507, 27 N. W. 317; *Gates v. Paul,* 117 Wis. 170, 182, 94 N. W. 55.

It is not contended by the respondent that if the amendment sought was in furtherance of justice it might not have been allowed by the trial court under sec. 2830, Stats. (1898), but it is argued that under the facts presented to the court in this case it was not an abuse of discretion to refuse leave to amend. The affidavits filed in opposition to the motion for leave to amend in substance showed: That prior to the time the answer was served the plaintiff had found a witness who could and would testify to the manner in which decedent met his death as averred in the complaint; that the answer was served in October, 1904; that the action had been noticed

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for trial and was upon the point of being tried several times after issue was joined and before January, 1908, when the motion to amend was made on the trial after plaintiff had rested her case; that plaintiff relied upon the fact that the averments of the complaint as to the time and manner in which Palmer met his death were not put in issue by the answer; that the witness first procured to prove such facts was killed in a railroad accident in October, 1906; and that plaintiff was unable to procure any witness to prove the necessary facts if the amendment were allowed, although she might have done so if there had been a timely joinder of issue on the fact involving the manner in which decedent came to his death.

The accident apparently happened at a time and place where the witnesses to how it occurred would not be numerous, if there were any such. It was not impossible that such evidence might be found even after the death of the witness relied on. But after the lapse of nearly three and one-half years after issue had been joined, the difficulty of procuring such testimony, if any existed, might well be so great as to amount to an impossibility, and it is difficult for this court to say that a meritorious cause of action might not be defeated if the amendment were allowed. In this case it might be a great hardship to the plaintiff, after the lapse of so long a time, to compel her to procure testimony to prove a fact that had been admitted. She was entitled to rely on such admission, and it would not be just that she should lose her cause of action because at a late date she was obliged to secure evidence that she might be unable to discover even though it existed. It does not appear that she was responsible for the delays in bringing the action to trial. Under the facts presented to the trial court it might well have concluded that the allowance of the amendment would not be in furtherance of justice as required by sec. 2830, Stats. (1898), and this court at least cannot say that the trial judge committed an abuse of discretion. The following cases amply sustain this view of

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the law: *St. Clara F. Acad. v. N. W. Nat. Ins. Co.* 101 Wis. 464, 466, 77 N. W. 893; *Ill. T. & S. Bank v. Alex. Stewart L. Co.* 119 Wis. 54, 94 N. W. 777; *Ballston Spa Bank v. Marine Bank,* 16 Wis. 120, 135; *Longwell v. Mierow,* 130 Wis. 208, 109 N. W. 943; *Phœnix Mut. L. Ins. Co. v. Walrath,* 53 Wis. 669, 10 N. W. 151.

The motions for a nonsuit and for a directed verdict being based on the assumption that there was no evidence showing or tending to show how Palmer met his death, and that the manner in which he lost his life was an issuable fact in the case, or the defendant should have been permitted to make it so by amendment, it follows that no error was committed by the court in denying such motions.

It is alleged that the court erred in receiving the evidence of the witness Grundmann, giving his opinion as to the length of time Palmer was dead when the witness saw him, because he was not a physician and was not shown to have had the necessary expert knowledge to qualify him to testify. In view of the failure of the answer to deny the time or manner in which Palmer met his death the admission of this evidence was harmless. In any event he was shown to have had considerable experience as assistant coroner of Milwaukee county, and we think the objection made went to the weight that should be given the testimony rather than to the competency of the witness.

Error is assigned because the court refused to submit this question in the special verdict:

"Under the conditions as to lights, barriers, guard rails, etc., surrounding or adjacent to the open space on the west side of Sixteenth-street viaduct, on the night of May 19, 1904, was such opening obvious to a traveler on foot crossing the viaduct from the east side toward the opening?"

In lieu thereof the court submitted the following question:

"Was the condition of such open space obvious to a traveler on foot crossing the viaduct from the east side toward such opening exercising ordinary care?"

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The appellant insists that the question should recite the existence of lights, barriers, etc. The respondent contends that there was a material dispute in the evidence in reference to the existence and location of lights, and that the testimony tended to show that there were no barriers whatever at the point where the decedent entered and where he evidently supposed the west sidewalk to be, and that therefore the question requested was improper and the one submitted by the court was proper. The material question was whether the hole in the sidewalk was so guarded that its dangerous character would be observed by a person approaching it in the direction in which the deceased approached it, if such person exercised ordinary care. This question fairly submitted to the jury the phase of decedent's alleged contributory negligence which defendant sought to cover by the question proposed by him. There is no necessity for covering mere evidentiary matters by questions in a special verdict, and neither is there ordinarily any necessity for reciting evidentiary facts in questions that are submitted. *Zimmer v. Fox River Valley E. R. Co.* 118 Wis. 614, 617, 618, 95 N. W. 957; *McCoy v. Milwaukee St. R. Co.* 88 Wis. 56, 61, 59 N. W. 453; *McLimans v. Lancaster,* 63 Wis. 596, 603, 23 N. W. 689; *Blankavag v. Badger Box & L. Co.* 136 Wis. 380, 117 N. W. 852, 854; *Wisconsin F. L. Co. v. Bullard,* 119 Wis. 320, 324, 96 N. W. 833. Many matters of evidence might bear on the alleged negligence of the decedent in not observing the hole, but after all the question was: Could he have observed it had he exercised ordinary care?

The defendant also claims that it was error not to submit to the jury the following question:

"Did the defendant fail to exercise ordinary care in leaving the opening on the west side of the viaduct in the condition as to lights, barriers, guard rails, etc., in which it was left on the night of May 19, 1904?"

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Instead of submitting the question asked, the court submitted the following question to the jury:

"Was such open space (as is referred to in question No. 1) properly guarded at the time of the injury to the decedent?"

The charge given to the jury under the foregoing question in the special verdict is quite full. It defines the duty of the defendant in reference to the maintenance of suitable guards to warn travelers of existing dangers. No exception is taken to such charge. The question submitted fairly covers the real issue, and under the authorities cited no error was committed in refusing to submit the question propounded by the defendant.

The defendant also requested that the following question be submitted to the jury: "Was the deceased, Thomas Palmer, on the evening of May 19, 1904, under the influence of liquor to any considerable extent?" The court refused to submit the question. The alleged intoxication of decedent was an evidentiary fact bearing upon the defense of contributory negligence. As was said in *Fitzgerald v. Weston,* 52 Wis. 354, 9 N. W. 13:

" . . . If the evidence tended to prove that the deceased was intoxicated in any degree at the time of the injury, that circumstance, with other facts in the case, should have gone to the jury on the question of contributory negligence."

This rule of law is approved in *Seymer v. Lake,* 66 Wis. 651, 29 N. W. 554. But it does not follow that the question should have been submitted to the jury. An affirmative answer would not necessarily entitle the defendant to judgment on the verdict, although it might cast upon the plaintiff the burden of showing that decedent used ordinary care. *Burns v. Elba,* 32 Wis. 605. The jury was required to find whether any want of ordinary care on the part of the decedent contributed to produce his injuries. Under this question the court charged the jury as follows:

"Intoxication in any degree at the time of the injury is a circumstance to go to the jury on the question of negligence

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or want of ordinary care. If you find that the deceased at the time of the injury was so intoxicated as to be incapable of managing and conducting himself with ordinary care and prudence, then you must find the deceased was not in the exercise of ordinary care; and if you find that this want of ordinary care and prudence did contribute in the slightest degree to produce the injury complained of, then you should answer question No. 6 yes."

Intoxication was an evidentiary fact tending to establish want of ordinary care and was properly submitted to the jury under the question dealing generally with want of ordinary care. A portion of the instruction is subject to criticism, but no exception is taken thereto.

The court charged the jury as follows:

"By 'ordinary care' is meant such care as a man of ordinary care and prudence would have used under circumstances like those disclosed in the testimony in this case."

Two objections are taken to this charge: (1) Because the court did not say that "ordinary care" was such care as a man of ordinary care and prudence would *ordinarily* have used; and (2) in not using the words "under the same or similar circumstances," instead of those used by the court, "under circumstances like those disclosed by the testimony in this case." The latter criticism on the charge is entirely unsubstantial and ephemeral in its character. The definition of "ordinary care" that has met the approval of this court in a long line of decisions is that it is such care "as the great mass of mankind *ordinarily* use in the same or similar circumstances." *Nass v. Schulz,* 105 Wis. 146, 150, 81 N. W. 133; *Duthie v. Washburn,* 87 Wis. 231, 233, 58 N. W. 380; *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554; *Ward v. M. & St. P. R. Co.* 29 Wis. 144; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 354, 85 N. W. 1036; *Dehsoy v. Milwaukee E. R. & L. Co.* 110 Wis. 412, 85 N. W. 973; *Schrunk v. St. Joseph,* 120 Wis. 223, 97 N. W. 946, and many others that might be cited. It would save this court some trouble if a definition so often repeated were adhered to,

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but it is not. The omission of the word *"ordinarily"* from the definition may sometimes be misleading. *Schrunk v. St. Joseph,* 120 Wis. 223, 231, 97 N. W. 946. Persons of ordinary care and prudence may do negligent acts, so that the real question, after all, is not what a person of ordinary care might have done if placed in the situation the decedent was placed in here, but what would such a person ordinarily do if placed in such a situation? On the other hand, the possibility of injury resulting from such an instruction is remote. The distinction between the correct definition and that here given is so refined that it is not apt to mislead the ordinary jury. The statute (sec. 2829) requires this court to disregard immaterial errors. Reversing causes because of them prolongs and renders litigation unnecessarily burdensome on litigants. So this court has held in several well-considered cases that the omission of the word here complained of was not reversible error where it was apparent no injury resulted therefrom. The instruction here given was taken almost *verbatim* from one given by the same trial judge in *Hanlon v. Milwaukee E. R. & L. Co.* 118 Wis. 210, 223, 95 N. W. 100, 104, where it was said that "the instruction assailed is strictly accurate." The criticism here made on the instruction was not made in that case, so the decision is wanting in the force it might otherwise have as a precedent because of that fact. However, in *Coppins v. Jefferson,* 126 Wis. 578, 583, 105 N. W. 1078, and in *Pumorlo v. Merrill,* 125 Wis. 102, 107, 103 N. W. 464, like instructions are approved. We think no prejudicial error resulted from the instruction given if it be conceded that the definition by the court of "ordinary care" is inaccurate.

Some other errors are assigned. They have been carefully examined, but we think none of them are tenable and that no useful purpose would be served by discussing them, and that the judgment of the court below should be affirmed.

By the Court.—Judgment affirmed.

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RYAN, Administratrix, Respondent, vs. OSHKOSH GAS LIGHT COMPANY, Appellant.

February 20—March 9, 1909.

Death caused by negligence: Defect in electric lighting wires: Sufficiency of special verdict: Instructions to jury: Evidence: Examination of hostile witness: Discretion: Damages.

1. In an action for death of one who was killed by coming in contact with a guy wire charged with electricity, the special verdict—submitting to the jury the questions whether defendant was negligent in permitting the guy wire to become so charged; whether such negligence was the proximate cause of the decedent's death; whether the primary wire which fed an electric light near by was displaced and in contact with other wires so as to render the guy wire dangerous; whether, if so, such condition had existed for such length of time that defendant, in the exercise of ordinary care, ought to have known and remedied the defect before the accident; whether the decedent was guilty of contributory negligence; and the amount of plaintiff's damages—is *held* fairly to cover the issuable facts without further submission of more specific questions as to defendant's negligence. *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, distinguished.
2. The finding that the defect had existed for such length of time that defendant, in the exercise of ordinary care, ought to have known and remedied it, is *held* to be sustained by the evidence—showing, among other things, that on Friday a falling tree caused a displacement and considerable slack in the primary wire carrying the high current; that on Saturday morning defendant's employees attempted to repair the defect by merely taking up the slack at a point some distance therefrom without going to the guy post or to the pole carrying the primary wire, the view of which from the point at which they worked was somewhat obstructed by intervening trees; and that the accident occurred on the following Monday.
3. The important question in such case was, not when the contact took place whereby the current passed into the guy wire, but when the wires became displaced so as to permit a contact to occur.
4. *Quære* whether, upon the facts of the case, defendant was not guilty of negligence as matter of law in failing to use some

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proper appliance which, in the event of defect or contact of wires, would prevent the passage of the current to the guy wire.

5. Refusal to give requested instructions is not error where they are fairly covered by the general charge.

6. Independent of statute a party has the right to examine a hostile or adverse witness, and it is largely in the discretion of the trial court whether questions in the nature of cross-examination shall be allowed.

[7. Whether sec. 4068, Stats. (Laws of 1907, ch. 271),—providing that any agent or employee of a corporation which is a party may be examined upon the trial as if under cross-examination, at the instance of the adverse party,—is valid, not determined.]

8. In fixing a widow's damages for death of her husband the jury may include the value of her support and protection by him during the time he would probably have lived, and may consider the addition that his earnings would probably have made to his property, and her reasonable expectation of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs.

9. An award of $7,000 for death of plaintiff's husband, forty-six years old, a good business man, thrifty and industrious, who had accumulated an estate of $7,000, is *held* not excessive.

10. In an action for death of plaintiff's husband the admission of evidence as to the official position which he had held, and that at one time he had attended college to better qualify himself for business, was not error.

11. It appearing that deceased was running a truck farm, raising berries and fruits, and that it was a profitable business, it was not error to permit a witness to state what would be "the average annual earning from an acre of strawberries, fairly cultivated and raised in that vicinity." The objection that it had not been shown how deceased cultivated his berries, the variety he raised, or the character of his soil, etc., went rather to the weight of such testimony than to its competency.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was brought to recover damages for the pecuniary value of the life of the plaintiff's intestate, who was killed by an electric current charged to have been negligently permitted to pass over defendant's wires to a certain guy

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wire with which intestate came in contact. The answer denied liability. The jury returned the following verdict:

"(1) Was the defendant guilty of negligence in permitting the said guy wire, at the point where the said Dennis H. Ryan came in contact therewith, to become charged with electricity? *A.* Yes.

"(2) If you answer the above question 'Yes,' then was such negligence the proximate cause of the injury and death of said Dennis Ryan? *A.* Yes.

"(3) Was the primary wire on the pole near the place of the accident displaced and in contact with other wires at the time and place of the accident so as to render the guy wire dangerous? *A.* Yes.

"(4) If you answer the question last above 'Yes,' then had such condition existed for such a length of time that the defendant and its officers, in the exercise of ordinary care and prudence, ought to have known of and remedied the same before the accident? *A.* Yes.

"(5) Was the injury to said Ryan which resulted in his death an accident the proximate cause of which the jury is unable to discover from the evidence? *A.* No.

"(6) Did a want of ordinary care and prudence on the part of said Dennis Ryan contribute to his injury and death? *A.* No.

"(7) If the plaintiff is entitled to recover, at what sum do you assess her damages? *A.* $7,000."

After denial of the several motions made by defendant the court rendered judgment in favor of the plaintiff upon the verdict, from which judgment this appeal was taken.

For the appellant there was a brief by *Doe & Ballhorn* and *Bouck & Hilton,* and oral argument by *J. B. Doe* and *John F. Kluwin.*

For the respondent there was a brief by *Doyle & Hardgrove,* and oral argument by *T. L. Doyle.*

KERWIN, J. At the time of the injury and for many years prior thereto the defendant was engaged in furnishing electricity to the city of Oshkosh and its inhabitants, and for

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such purpose maintained poles, wires, and equipments in the streets. At the point where Regent street in said city connects with Northwestern avenue was maintained an arc lamp supported by a span wire, each end of which was attached to a pole about thirty feet from the ground. This lamp, which hung over the center of Northwestern avenue, was fastened to the span wire by a metal interlocking device, which was attached to a wire under the span wire and to the northwest corner pole and extended down the pole to within a few feet of the ground. On the south side of Northwestern avenue, between the sidewalk and driveway, was a guy post to which a wire supporting the south pole was fastened. Near the top of this pole the span and guy wires wound around the pole in such manner as to be in contact. The primary wire which fed the lamp carried 2,300 volts of electricity. The arc wires carried about 8,000 voltage. At the time of the accident the primary wire was found detached from the insulator and lying across the cross-arm against the pole and wire which fed the arc lamp. The guy post, which was about six feet high, stood thirty-five feet from the pole which supported the arc lamp, and the guy wire was fastened to this guy post at about three inches from the top. On the 29th day of July, 1907, the deceased was killed by a current of electricity which had escaped to the guy wire with which the deceased came in contact. A great many errors are assigned, but they may, so far as necessary to discussion, be grouped under a few heads.

1. The form of the special verdict is vigorously assailed, and particularly upon the authority of *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865. It is insisted that the issuable facts were not submitted, and that the court erred in refusing to submit to the jury the questions asked by the appellant. We have set out in the statement of facts the special verdict submitted, and think it fairly covered the issuable facts raised by the pleadings, namely, whether de-

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fendant was guilty of negligence in permitting the guy wire with which the deceased came in contact to become so charged, whether the primary wire was displaced and in contact with other wires at the time of the accident so as to render the guy wire dangerous, and whether such condition had existed for such time that the defendant and its officers ought to have known of and remedied the defect; also, as to proximate cause, contributory negligence, and amount of damages. These were the material issuable facts raised by the pleadings. The instant case is clearly distinguishable from the *Rowley Case*. There the negligence complained of was the placing of a truck by defendant's employee on the station platform in such position that a passing train struck it and hurled it against the plaintiff, and the court refused to submit the questions asked covering this material controverted fact or any substitute therefor, and therefore the main fact was not found at all, except in the form of a general verdict. So the case is not controlling here.

2. It is also claimed that there was not sufficient evidence to support a verdict for plaintiff. This contention is based mainly upon the idea that it was not shown that the defect had existed a sufficient length of time before the injury to charge defendant with notice. We think this position untenable. That the dangerous current which killed Ryan escaped to the guy wire from the primary wire is without dispute and the negligence established if defendant had notice in time to have remedied the defect before the injury. We think this question was for the jury. The accident occurred July 29, 1907, about noon. On Friday, July 26, 1907, a tree which stood on the south side of Northwestern avenue near the pole to which the charged wire ran was cut, and in falling a branch struck the wires and broke one and injured others, causing slack in one or two of the wires. On the evening of that day, the 26th, notice was brought to an agent of the defendant, who examined the premises and found the wires

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out of order and considerable slack in the primary wire which carried the high current. This displacement and defect of the primary wire was without doubt, under the evidence, caused by the tree falling upon the wires. On Saturday morning, July 27th, it appears from the evidence the agents of defendant attempted to repair the defect which was discovered Friday, but it is manifest that the question of whether they did properly remedy the defect was for the jury. If they did not, then the jury was justified in finding that the defect had existed such time as to render defendant liable for failure to repair. It would serve no useful purpose to go into a discussion of the evidence upon this proposition. The employees of defendant on Saturday took up the slack which they found in the wires, but did not go to the guy post or pole carrying the primary wire in question, but took up the slack at a point some distance therefrom and concluded that all was well.

It appears from the evidence that the view from the point where the men worked in taking up the slack to the pole in question was somewhat obstructed by thick foliage upon trees intervening, and that the repairing crew assumed that the taking up of the slack was all that was necessary and did not discover the defect at the pole from which the current escaped to the guy wire. In any event there is ample evidence to support a finding that the defect occurred on Friday and so remained until the injury Monday noon, which was sufficient to support the finding of the jury on this point. The jury found that the defendant negligently permitted the guy wire to be charged with a deadly current of electricity. This finding is supported by the establishment of the fact that the defect existed to the knowledge of the defendant for such length of time before the injury as to charge defendant with negligence in failure to repair. It is at least a serious question whether upon the facts of this case the defendant would not be guilty of negligence as matter of law in failing to

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prevent the escape of the dangerous current to the guy wire by some proper appliance which in the event of defect or contact of wires would prevent the passage of the current to the guy wire. This danger, we understand, may be easily guarded against, as shown by the evidence, and that it is customary to so protect guy wires as to prevent dangerous currents escaping over them in such manner as to endanger the public. But we do not regard it necessary to put our decision upon that ground, as we regard the evidence ample to support the finding that the defect had existed a sufficient time to charge the defendant with notice thereof in time to have repaired it before the injury. The showing of negligence and proximate cause was ample to support the verdict under the rule laid down by the authorities in such case. *Wilbert v. Sheboygan L., P. & R. Co.* 129 Wis. 1, 106 N. W. 1058; *Nagle v. Hake,* 123 Wis. 256, 101 N. W. 409; *Home T. Co. v. Fields,* 150 Ala. 306, 43 South. 711; *Paine v. Electric I. & P. Co.* 64 App. Div. 477, 72 N. Y. Supp. 279; *Walters v. Denver C. E. L. Co.* 17 Colo. App. 192, 68 Pac. 117; *Newark E. L. & P. Co. v. Ruddy,* 62 N. J. Law, 505, 41 Atl. 712; *Wolpers v. New York & Q. E. L. & P. Co.* 91 App. Div. 424, 86 N. Y. Supp. 845; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 19 S. E. 344; *Wood v. Wilmington C. R. Co.* 5 Pennewill (Del.) 369, 64 Atl. 246; *Jacks v. Reeves,* 78 Ark. 426, 95 S. W. 781; *Norfolk R. & L. Co. v. Spratley,* 103 Va. 379, 49 S. E. 502.

3. Several errors are assigned on the charge and refusal to charge. We shall not go over them in detail. We are convinced that, where instructions asked and refused cover correct statements of the law as applicable to the facts of the case, they were covered by the charge given. Some of the requests to charge refused were improper and misleading. For example, the request to charge as to when the contact took place, and that if it took place as late as Monday, the 29th, they should answer the fourth question "No," was incorrect

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and properly refused. The important question was, not when the contact in fact took place, but when the wires became displaced so as to suffer a contact to occur. It may well be that the insulator was removed and the wires so displaced by the falling of the tree upon them as to cause the contact later which produced the injury. Alleged errors in the charge are covered by several assignments of error argued by appellant. We think the charge fairly submitted the case to the jury and no prejudicial error was committed in that regard. We shall not prolong this opinion by a discussion of the many assigned errors under this head.

4. Error is assigned in permitting the examination of an employee of the defendant. It is insisted that the examination under sec. 4068, Stats. (1898), as amended by ch. 271, Laws of 1907, was error because this section as amended is void under the decision in *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456. We do not find it necessary to consider the validity of the section referred to as amended. The plaintiff had a right to examine a hostile or adverse witness independent of the statute, and the form of questions in such case is largely within the discretion of the court, and we do not find that such discretion was abused.

5. Perhaps the most serious questions raised are those relating to the amount of the verdict and the evidence respecting damages. The jury awarded $7,000 damages. The plaintiff is the widow of deceased, and at the time of the accident was forty-one years of age and the deceased forty-six. Deceased was thrifty and industrious and provided well for plaintiff. Plaintiff and deceased were married in 1887. Deceased died intestate, leaving no children. At the time of his marriage he had only about $700, and at the time of his death $7,000. He operated a small farm and did some other business, and was a good business man. Quite broad discretion is allowed juries under the authorities in assessing damages in such cases. The court below refused to disturb

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the verdict, and such fact is entitled to weight in such cases. *Hayes v. C., M. & St. P. R. Co.* 131 Wis. 399, 111 N. W. 471; *Bright v. Barnett & R. Co.* 88 Wis. 299, 60 N. W. 418. In fixing the amount of damages the jury was entitled to include the value of the plaintiff's support and protection by the deceased during the time he would probably have lived. They were also entitled to consider the addition that the earnings of deceased would probably have made to his property had he continued to live and the reasonable expectations which plaintiff had of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs. *Rudiger v. C., St. P., M. & O. R. Co.* 101 Wis. 292, 77 N. W. 169; *Kaspari v. Marsh,* 74 Wis. 562, 43 N. W. 368; *Lawson v. C., St. P., M. & O. R. Co.* 64 Wis. 447, 24 N. W. 618; *Castello v. Landwehr,* 28 Wis. 522; *Leque v. Madison G. & E. Co.* 133 Wis. 547, 113 N. W. 946. Under the rule of damages established by this court in such cases we cannot say that the verdict is excessive.

6. Complaint is made respecting the admission of evidence on the question of damages, especially respecting the official position occupied by deceased, that at one time he attended college to better qualify himself for business, and principally in admitting evidence as to the average earning from crops, notably the following question:

"State, if you know, about what would be the average annual earning from an acre of strawberries, fairly cultivated, and raised in the vicinity and where Mr. Ryan lived."

This question was answered under objection. It appears from the evidence that deceased was running a truck farm, raising berries and small fruits, and that it was a profitable business, and the purpose of this line of examination was to show these facts as having a bearing upon the deceased's earnings. Also another question of similar character respecting what an acre of raspberries, fairly cultivated, would produce, was allowed to be answered under objection. The objec-

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tion to these questions was based upon the fact that it was not shown how deceased cultivated his berries, the variety of berries raised, the character of the soil, cost of raising, preparing for market, and marketing. It does not appear that such objection went to the competency of the evidence, but rather to its weight. Some of the questions and answers allowed under objection, perhaps, were rather remote from the question in issue, but we do not think they can be said to have been prejudicial.

Others errors assigned which we have not specifically treated have all received careful consideration, and we find no prejudicial error in the record.

By the Court.—The judgment of the court below is affirmed.

STATE EX REL. PITTSBURGH COAL COMPANY OF WISCONSIN, Respondent, vs. PATTERSON, City Clerk, Appellant.

February 20—March 9, 1909

(1) Certiorari: *Practice: Findings of fact.* (2, 3) *Sales: Delivery f. o. b. cars: When title passes.*

1. Upon *certiorari* to review proceedings of a *quasi*-judicial body involving matters of fact determinable upon evidence, formal findings of fact and conclusions of law are not necessary, the theory of the proceeding being that the evidence reasonably admits of a finding but one way, and that contrary findings are errors of law and jurisdictional.
2. In case of an executory contract for the sale and delivery of chattels f. o. b. cars at a particular point, if nothing appears to the contrary the intention of the parties is presumed to be that the title shall pass upon such delivery.
3. Under a contract for the sale of coal to a railway company, providing that it should be delivered from the docks free on board cars on the vendee's tracks and be paid for according to weights there determined, and that at all times until so delivered it should be at the risk of the vendor subject to ordinary handling,

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it is *held* to have been the intention of the parties that the title should pass when the coal was delivered on the cars as stated; and the words "deliver" and "delivery" in certain provisions of the contract relating to the accumulation of the requisite stock of coal upon the docks before the close of navigation are *held* to have been used only in the sense of delivery for the purpose of rendering the vendor competent to make the final delivery contemplated by the contract.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

For the year 1907 the *Pittsburgh Coal Company of Wisconsin* had in its possession on its dock at Superior, Wisconsin, $82,000 worth of coal. Such property, in due season, was placed on the assessment roll of the city of Superior for taxation for such year as the property of, or as properly assessable to, said company. Thereafter such company seasonably made application to the board of review of the city of Superior to have the assessment expunged from the assessment roll upon the ground that the company was neither the owner of said coal nor the agent for the owners. At the same time it submitted to said board due proof that the coal was on its dock for delivery to the Great Northern Railway Company, the Northern Pacific Railway Company, and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, a particular proportion thereof having been set aside to be delivered to each such company pursuant to three several contracts, one being with each of said companies, of which the following copy of contract with the Northern Pacific Railroad Company is a sample:

"Whereas, the Coal Company is engaged in the business of selling coal of the variety known as 'Pittsburgh,' and whereas the Railway Company desires to purchase of the Coal Company fifty thousand (50,000) tons of such coal, screened over three-quarter (¾) inch screens at the mines, it is agreed, therefore,

"First. The Coal Company agrees to furnish the Railway Company fifty thousand (50,000) tons of best quality bitu-

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minous coal of the variety known as three-quarter (¾) inch thin vein Pittsburgh, mined during the year 1906, the same to be handled and loaded on cars from such docks as may be mutually agreed upon by the Coal Company and the Railway Company, and delivered free on board cars on the tracks of the Northern Pacific Railway Company at Superior, Wisconsin, or Duluth, Minnesota, said coal to be screened over three-quarter (¾) inch bar screen at the mines and to be free from dust and other impurities, the same to be delivered in such quantities and at such times as may be required by the Railway Company, from the date of this contract to July 1st, 1907, but the Railway Company agrees to take delivery in as nearly equal monthly proportions as may be practicable based on its requirements.

"Second. The movement of the coal from the mines shall commence at once and the entire tonnage contemplated under this contract shall be stored on dock or docks as hereinbefore provided on or before the close of navigation on the great lakes for the season of 1906, unless by mutual consent in writing of the parties, a portion of the tonnage contracted for be allowed to come forward after the opening of navigation on the great lakes in 1907, it being understood that the coal is to be stored and cared for on docks at the head of Lake Superior until the end of this contract, viz., the first day of July, 1907, if the Railway Company should so elect.

"The Coal Company agrees that representatives of the Railway Company shall have at all times free access to the mines from which said coal is to be mined and to the vessels and docks, for the purpose of inspection at the mines of the coal, and on vessels or docks of the method in which it is or will be handled, and the Coal Company agrees that it will make good and pay to the Railway Company all damage it may sustain by reason of the coal not being of the kind and quality provided for in this agreement when delivered on its cars subject to ordinary handling, and the Coal Company hereby agrees to give due and timely notice in writing if desired to the representative of the Railway Company of the names of the vessels on which said coal is shipped in order that they may be enabled to make due inspection of the same and the manner of handling such coal, and the Coal Company

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agrees to furnish the Railway Company, as directed, statements showing car numbers and weights, the mine and grade of each car loaded on vessels. After such notice and inspection such cargo, if accepted by the Railway Company, shall be duly stored and delivered under the terms of this agreement.

"It is further agreed that representatives of the Railway Company shall have free access at all times to the scales over which the coal contemplated by this contract is being weighed and any inaccuracies discovered in the weight of the coal shall be immediately rectified.

"Fourth. The Coal Company hereby agrees that the entire tonnage contemplated under this contract is to be kept entirely separate from any other coal which may be stored on the dock contemplated by this agreement, whether the property of the Coal Company, or coal being stored by them for others.

"Fifth. In consideration of the delivery of said coal in accordance with the terms of this contract, the Railway Company agrees to pay to the Coal Company therefor, the sum of two dollars and eighty cents ($2.80) per net ton of two thousand (2,000) pounds, and to pay at such rate for the coal delivered in any month during the month following that in which such delivery takes place.

"Sixth. It is further agreed that in case the Coal Company should fail to deliver on the docks the full amount of coal of the quality and kind provided within the time stipulated between the date of this contract and the close of navigation on the great lakes for the season of 1906, the Railway Company may, by written notice served upon the Coal Company within thirty (30) days after the first day of December, 1906, require the Coal Company to deliver a quantity of such coal equal to the amount remaining undelivered under the terms of this agreement, and the Coal Company agrees that it will make such delivery as the exigencies of the Railway Company may demand until the full amount called for by this contract is delivered, such delivery to be made during the closed season of navigation at St. Paul, Minnesota, or Superior, Wisconsin, at the option of the Coal Company."

The application was further supported by evidence given before the board to the effect that the coal was placed on the

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docks, part for each of the railway companies heretofore mentioned, in all respects as provided for in the contracts, and was considered accepted when placed in the coal piles on the dock; that as the coal was unloaded it was not put directly into the care of the vendees; that after it was so set aside the respective purchasers had jurisdiction over it. There was considerable evidence indicating performance of the contract according to its terms.

The application was denied. Thereupon the proceedings before the board were, pursuant to a writ of *certiorari,* duly carried to the circuit court for Douglas county for review. In disposing of the matter in such court formal findings of fact were made in accordance with the contract and indisputed proofs presented to the board, with conclusions of law to the effect that the coal was not subject to assessment in the city of Superior for 1907, because the property belonged to the three railway companies under the contracts before mentioned, the same being held by such companies for use in the operation of their railroad business, and that the assessment of said property to the coal company and refusal of the board of review to strike the assessment from the assessment roll were illegal. The decision of the board was reversed and a judgment ordered and in due form rendered, from which this appeal was taken.

For the appellant there was a brief by *Thomas E. Lyons* and *T. L. M'Intosh,* and oral argument by *Mr. Lyons.*

For the respondent there was a brief by *Grace & Hudnall,* and oral argument by *H. H. Grace.*

Marshall, J. A question of practice is suggested as to whether it was proper for the trial court to close the controversy by formal findings of fact and conclusions of law, in form as in case of a trial of an equitable action. Strictly speaking, no such proceedings were necessary. The *certiorari* only presented questions of law. The theory upon which a proceeding of a *quasi*-judicial body, involving matters of

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fact determinable upon evidence, is challenged for judicial review, is that such evidence does not reasonably admit of a finding but one way and that contrary findings are errors of law and that such errors are jurisdictional as regards such bodies. *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048; *State ex rel. J. S. Stearns L. Co. v. Fisher,* 124 Wis. 271, 102 N. W. 566.

The question at issue here turns on the contract. If according thereto the coal, upon being delivered on the dock in separate piles, corresponding to the contracts, did not become the property of the respective railway companies, but the transition of title was intended to occur only upon the property being loaded upon cars to be shipped out to such companies, then it was assessable to respondent, and the judgment must be reversed.

The evidence taken before the board of review, aside from the written contracts, was and is valuable only as showing that the coal, at the time of the assessment, had only reached the stage, in execution of the contracts, of segregation into specific lots upon the dock to await delivery on cars as called for.

It is elementary that, in case of an executory contract for the sale of personal property, when the title passes is matter of intention to be determined from the agreement; by its letter where there is no ambiguity, and, otherwise, by its letter in the light of such circumstances as may properly be considered in aid of determining the intention by rules for judicial construction. Generally speaking, in case of an executory contract to sell and deliver personalty, nothing in the statute of frauds interfering, when there is nothing left to be done on the part of the vendee or vendor, or the latter and the vendee jointly, and the chattels have been set aside and appropriated to the contract, the amount thereof and price all settled, the title passes, but such passing may, never-

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theless, wait upon change of possession, even though the price has been agreed upon and paid, or upon the doing of something after transition of possession. Such passing may occur, leaving the amount of property and the amount of money to be paid, yet to be ascertained, or any other of many things that might be stated, according to the intention of the parties embodied in the sale contract. These principles are so elementary that we will not take time and space to enlarge upon them or specify the many circumstances that have been held to indicate an intention to pass title in advance of change of possession.

The contracts in question each contain two groups of features. The first and fifth clauses make a plain agreement for a sale of coal delivered from the dock f. o. b. cars there, the same to be paid for according to weights there determined, at a specific price per net ton of 2,000 pounds. There would be little room for controversy but that, if there was nothing in the contract to indicate to the contrary, the intention of the parties was to have title pass at the time of such determination of quantities and delivery.

The general rule is, nothing appearing to the contrary, that in case of an executory contract for the sale and delivery of chattels f. o. b. cars, at a particular point, the intention of the parties is presumed to be that the title shall pass upon such delivery occurring. In *Vogt v. Schienebeck,* 122 Wis. 491, 100 N. W. 820, this court said, referring to many authorities to that effect, that "a sale f. o. b. cars means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating" a different purpose. That was referred to with approval in *Fromme v. O'Donnell,* 124 Wis. 529, 103 N. W. 3, the court holding that a sale for an agreed price f. o. b. cars at a stated place, must, unless controlled by

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some other feature of the sale contract, unmistakably show an intention to pass title to the subject of the sale upon delivery thereof, free of expense, to the vendee on cars at the designated place, under the general rule that, nothing appearing efficiently to the contrary, "as between vendor and vendee the title to the subject of the transaction passes from the one to the other when the terms of the sale are agreed upon and everything the vendee has to do with the matter has been done."

The second group of features in the contracts, upon which respondent must rely to control the first, relates to acts of the vendor, or the vendee and vendor conjointly, creating the physical competency of the former to respond promptly to requests for performance of the final act, to wit: delivery of coal f. o. b. cars at the dock, not only as to having the requisite stock to draw from, as to each particular vendee, but as to such stock being of the kind called for by the agreement.

The second clause relates to the time of accumulation of the stock in storage on the dock, and opportunity of representatives of the vendee to inspect at the mine and otherwise the coal proposed to be accumulated, for certainty that the stock approved at the mine should actually reach the particular pile on the dock set aside to be delivered from in final performance, indicating, unmistakably, a purpose to approve of the stock before transportation thereof by cars from the mine to the vessels used to accomplish the final transit to the coal piles on the dock, and to have the coal so approved, barring damages by negligent handling or other damages not ordinarily incident to proper handling, such as the contract called for.

It contains a further paragraph, regarding the assurance of correct weights, which evidently does not relate to weights at the mine, since it refers to a rectification of mistakes when discovered, which, manifestly, would be inconsequential to the vendees, except as to weight on cars at the final delivery point.

The fourth clause relates to isolation on the dock of the

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stock to be drawn from to fill a particular contract, in harmony with the general scheme that the identical coal approved at the mine, and none other, should be used to make final deliveries from, and that competency to make such deliveries should not be impaired by dealings of the vendor with others.

The sixth and last clause of the contract contains a stipulation as to accumulation of the requisite stock of coal on the dock set aside by itself to accommodate the contract, in case of failure to do so before the close of navigation. The words "deliver" and "delivery" are used, but not in the sense of final delivery; only in the sense of delivery for the purposes of competency to make the final delivery mentioned in the first clause.

There is little, if anything, in the second group of features indicating that they have to do with anything except preparation for final delivery f. o. b. cars at the dock, provided for in the first clause.

The idea that the parties intended the title to pass to the vendees at any instant prior to the consummation of the final act of delivery, is negatived by the second paragraph of the second clause, to the effect that the coal at all times, till delivered on cars at the dock, shall be at the risk of the vendor subject to ordinary handling.

We cannot escape the conclusion that the parties contemplated that the transition of title to the coal should wait upon placing the same on cars at the dock, and doing everything in that regard suggested by the term "free on board cars;" that loss of coal prior to that time, by any means other than ordinary handling, would fall on the vendor.

Little help is afforded in a case of this sort by precedents. It is governed by familiar principles of law and by the particular intent, evidenced by the particular contract, in the light of its own peculiar circumstances. Perhaps if precedents were needed, *Miller v. Seaman,* 176 Pa. St. 291, 35 Atl. 134, is as near analogous to this, as to facts, as any case which

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can be readily found. The sale was of specific piles of lumber located in a lumber yard, to be inspected, measured, and paid for, f. o. b. cars at the yard, and so delivered as ordered, provided that if not all ordered within a specific time, the balance to then be inspected and measured on the yard and paid for. Before all of the lumber was ordered out part of it was carried away by a flood. It was held that the lumber so carried away was the property of the vendor, as title by the contract was not to pass in advance of delivery f. o. b. cars as agreed upon.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment affirming the decision of the board of review.

NEALE, Plaintiff in error, vs. THE STATE, Defendant in error.

February 20—March 9, 1909.

Evidence: Weight: Highways by user: Limits: Obstruction: Dedication: Instructions to jury: Appeal: Material and immaterial errors.

1. Where witnesses on one side testified from actual measurement that a post was three feet distant from the traveled track of a highway, while witnesses on the other side testified somewhat indefinitely and from mere recollection that it was nearer, the testimony of the former should be accepted as true.
2. Where a highway by user is established, the wheel tracks and the land included between them do not necessarily designate the limits thereof, since at times, as when teams pass each other or the track is muddy, necessity or convenience may require departure from the main traveled track.
3. A post set three feet from the traveled track of a highway may constitute an obstruction within the meaning of sec. 1326, Stats. (1898), rather than a mere encroachment within the meaning of sec. 1330.
4. Such a post may constitute an obstruction though set between two large stones already in the highway.

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5. In an action to recover a penalty for obstructing by posts a highway claimed to have been established by user, a requested instruction to the effect that, if defendant had occupied up to the line of said posts adversely and continuously for a period of twenty years immediately preceding the action, then he had a right to place the posts there, is *held* inapplicable, in the absence of any evidence that after the public had acquired an easement by prescription or otherwise the land had been adversely occupied by defendant for twenty years.
6. An instruction that plaintiff claimed that defendant "obstructed a certain highway" at a point specified, "by setting some posts within said highway," and that "defendant admits the setting of some posts at the place mentioned," could not have been understood by the jury as stating that defendant admitted that the posts were set in the highway, especially in view of further instruction that the jury should find for defendant unless satisfied that the posts were within the limits of the highway as it existed at the time, etc.
7. The presumption of a dedication is not necessary to support an easement acquired by the public by user; but it was a harmless error to charge that a highway by user is founded upon a dedication, which is evidenced by twenty years of adverse use by the public, where the jury found the existence of a highway by user at the place in question.
8. Where the distance between the fences on the sides of a highway established by user only, not by dedication, was in places more than four rods, and the public did not in fact use the entire strip between the fences, it was prejudicial error to charge the jury that the maintenance of such fences for twenty years was conclusive proof of dedication of all land between them.

ERROR to review a judgment of the circuit court for Marquette county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

This action was originally brought in justice's court to recover a penalty for which it is claimed the plaintiff in error (hereinafter called the defendant) became liable by reason of violating the provisions of sec. 1326, Stats. (1898). The alleged violation consisted in placing fence posts in a certain highway in Marquette county in such a manner as to constitute an obstruction therein. The answer alleged title in the defendant by deeds of conveyance and also because of adverse

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possession for more than twenty years, and averred that a determination of the controversy could not be had without the title to the lands referred to being put in issue, the defendant claiming to be the lawful owner thereof and to be entitled to the possession of the same. The proper undertaking was filed and the case was removed to the circuit court, and a trial in that court resulted in a verdict for the plaintiff, in which the amount of the forfeiture to be paid by the defendant was assessed at the sum of $1. The defendant prosecutes this writ of error from the judgment entered upon such verdict, and assigns as error (1) the erroneous admission of evidence on the part of the state against the objection and exception of the defendant; (2) the erroneous rejection of evidence offered by the defendant upon the objection of the state; (3) refusal of the court to grant a nonsuit; (4) refusal of the court to grant defendant's motion for a directed verdict; (5) refusal to instruct the jury as requested by defendant; (6) error in the instructions given to the jury.

Daniel H. Grady, for the plaintiff in error.

D. W. McNamara, for the defendant in error.

BARNES, J. The errors assigned on rulings on evidence are not substantial and need not be discussed.

The third and fourth errors relate to the refusal of the court to grant a nonsuit and to direct a verdict. It is claimed that these motions should have been granted because the evidence offered by the state, at best, showed that the post nearest the traveled track, as the road was used when the posts were put in the ground, was three feet distant from such track, and constituted a mere encroachment on the highway and not an obstruction of it. There is evidence tending to show that the post was nearer than three feet to the traveled track, but we accept counsel's argument as sound that inasmuch as the witnesses for defendant on this point testified from actual measurement, while those for the state testified somewhat indefi-

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nitely and from mere recollection, the evidence of the former should be accepted as true. Counsel urges that in *Konkel v. Pella,* 122 Wis. 143, 99 N. W. 453, this court held as a matter of law that a fence built three feet from the traveled track of a highway constituted an encroachment within the meaning of sec. 1330, Stats. (1898), and not an obstruction within the meaning of sec. 1326. In this case the court in its opinion said that the fence in question was not an obstruction, because it was conceded that at all points "the fence was outside of the limits of any legal highway, except as legality might have been acquired by travel over the line indicated by the wheel tracks in question for a period of more than twenty years," and, further, that "the evidence is overwhelming that travel even upon the lines of the wheel tracks above referred to was easy and unobstructed." The court did not decide that in no case and under no circumstances could an obstacle within three feet of the traveled track constitute an obstruction. If this were so, the parties owning land on either side of a public highway created by user might place their fences three feet from the traveled track and escape prosecution for obstructing the road, although two teams could not pass therein. We do not think that, where a highway by user is established, the wheel tracks and the land included between them necessarily designate the limits thereof. The correct view is taken in *Bartlett v. Beardmore,* 77 Wis. 356, 363, 46 N. W. 494, 496, where it is said:

"Most country roads have a narrow beaten track, but it does not follow that the use is confined to such path. Teams must pass each other, and for that purpose must necessarily depart from the main traveled track. So, when such track is muddy, public convenience requires departure from such track. We cannot hold that the public can acquire no legal right to such sides of the main traveled track by such ordinary user."

Under the testimony it was a fair question for the jury to say whether the posts in controversy constituted an obstruc-

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tion or not. *Jones v. Tobin,* 135 Wis. 286, 115 N. W. 807. It is argued that the post nearest the traveled track was set between two large stones that had been placed there at some prior time, and that if there was an obstruction it was caused by the stones rather than by the post. The placing of one obstruction in the road would hardly justify the placing of another one at the same point, and the stones might not interfere in the least with the passage of a load of hay, while a post five or six feet high might.

Error is assigned because the court refused to give the following instruction:

"You are further instructed that if the defendant or his predecessors in title openly, notoriously, adversely, and continuously for a period of twenty years immediately preceding the commencement of this action occupied up to the line marked by the placing of the posts in question, then he had a right to place the said posts at the point indicated, and you should return a verdict in his favor."

Without passing upon the correctness of this instruction as an abstract question of law, we fail to see how it was applicable to the facts proved on the trial. The defendant had the paper title to his land, as we understand the record. At least there was no controversy on that point. The public, if it had any right in the land where the posts were set, acquired its easement by user, by grant, by dedication, or by condemnation. It claimed right by user, although some circumstances were shown from which dedication might possibly be inferred as a matter of fact. In order that the instruction should be germane the evidence should show that the public at one time had acquired an easement by prescription or otherwise, and that after such right became vested in the public the land was adversely occupied by the defendant and his predecessors for twenty years. We have been unable to find any such evidence. The state contended that fences were formerly maintained on the line now occupied by defendant's fence. The defendant claims that the fence up to about nine

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years ago was on the line of the posts, which it is now asserted constitute obstructions in the road. If the state is right in its claim, then there has been no adverse possession by the defendant and his grantor of the strip of land in dispute. If the defendant is right, then it is clear that the public never acquired any easement in the strip.

Error is assigned because the court instructed the jury as follows:

"The claim of the plaintiff is that the defendant on the 27th day of December, 1905, obstructed a certain highway known as the Packwaukee and Portage road, at a point specified, by setting some posts within said highway. The defendant admits the setting of some posts at the place mentioned at or about the time stated."

The criticism on this instruction is that the court told the jury in effect that it was admitted that the posts were set in the highway. The jury could hardly misunderstand the import of the instruction. The court told the jury that it was claimed that the highway had been obstructed by placing posts at a point specified. There was no material dispute about where the posts were set, and when the jury was informed that it was admitted that the posts were set at the "place mentioned," the latter words could only be understood as referring to the place where it was conceded the posts were, and which is referred to in the first part of the instruction as the "point specified." The jury was instructed to find for the defendant "unless satisfied by a preponderance of the evidence . . . both that the posts or one or more of them set by the defendant were within the limits of the highway as it existed at the time, and that such of the posts or any of them, if any there were, as were within the highway endangered, impeded, or seriously inconvenienced travel on the highway." In view of the instruction last quoted the jury could not have been misled by the instruction complained of, even though it be conceded that there is some ambiguity in the language used.

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Error is assigned because the court gave the following instruction to the jury:

"In case of a highway by user the highway is founded upon a dedication by the abutting owners, which dedication is evidenced by twenty years of uninterrupted use by the public openly, notoriously, and adversely."

As an abstract proposition of law this instruction is not correct under the decisions of this court in *Frye v. Highland,* 109 Wis. 292, 299, 85 N. W. 351, and *Randall v. Rovelstad,* 105 Wis. 410, 426, 81 N. W. 819. The presumption of a dedication is not necessary to support an easement acquired by the public by user. *State v. Lloyd,* 133 Wis. 468, 113 N. W. 964. The instruction, however, was harmless. If there was a highway at the place in question established by user, it was immaterial for the purposes of the case whether the land so used had been dedicated by the owner or not.

Error is also assigned because the court instructed the jury as follows:

"In case a highway becomes established by uninterrupted use for twenty years, the uninterrupted maintenance for this period of a fence or other obstruction indicating the line to which the owner dedicates for public use fixes the fence or obstruction as the line of the highway."

This instruction certainly is too broad. In new localities where land is cheap, fences are often built more with reference to the contour of the land than with reference to the usual and customary limits of highways. Numerous instances could no doubt be found where the distance between the fences on either side of the highway is two or three times as great as the width of the ordinary road. To say in such a case that, after the lapse of twenty years, there is a conclusive presumption of law that the land between the fences has been dedicated to the public, is hardly reasonable. The public has no use for such land for highway purposes, and the intention to dedicate to the public in the first instance was lacking.

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The instruction in question is not in harmony with *Stricker v. Reedsburg,* 101 Wis. 457, 463, 77 N. W. 897, or with *Randall v. Rovelstad, supra.* There is evidence in this case tending to show that the distance between the fences as originally constructed was more than four rods, at least in some places. Where such a condition is disclosed, and where it is apparent that the public did not in fact use the entire strip between the fences, we think it is erroneous to say that the maintenance of such fences for a period of twenty years furnishes conclusive proof of dedication of all land located between them.

It has been troublesome to determine with any degree of satisfaction whether the erroneous instruction was prejudicial to the defendant. If not, no reversible error resulted therefrom. The case was tried by attorneys, and perhaps jurors, who were apparently familiar with the *locus in quo.* Much of the testimony is given with reference to objects entirely unfamiliar to this court. What we take to be an eighth line is referred to throughout the testimony as a quarter line. Directions are not correctly stated. The printed case was prepared in palpable violation of the rules of this court, the entire evidence in the form of question and answer being printed. This fact, taken in connection with the ambiguous nature of the evidence in some particulars, has made it laborious and difficult to arrive at a satisfactory conclusion as to what was in fact proved by the testimony offered. There is evidence to show that a rail fence was built on the *Neale* side of the road in 1864. The evidence does not show how long such fence was maintained, or when it was replaced, or where the new fence was built if the old one was replaced, or whether any considerable period elapsed after such fence fell into decay and before a new one was built. There is evidence tending to show that some of the remnants of such fence are still discernible along the line where the defendant set his posts. There is also evidence that defendant built his fence a few years ago some distance further from the road than the rail

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fence was originally built, while there is evidence also tending to show that such fence was in fact built upon the line of the rail fence. Then there is evidence tending to show that the fence was replaced once or twice, but when it was replaced, or where the new fence was built, does not appear. It was testified to that a fence existed thirty years ago on the *Neale* side, but it does not appear when it was built, or just where it stood. It is not always clear whether the evidence on this point relates to the fence on the *Neale* side of the road or to the fence on the opposite side, although there is evidence tending to show that a fence was also built on the opposite side about the year 1864. It is impossible for this court to say, and we do not think the evidence shows, that a fence was maintained in one location on the *Neale* side of the road at the point in controversy continuously for the period of twenty years. If there was no such fence, then the instruction might not be harmful, because there was no evidence before the jury to which the instruction could apply. If there was such evidence, and the jury came to the conclusion that the ancient fences were built upon the line testified to by witnesses for the state, then the instruction might well be misleading and prejudicial, because the jury was informed as a matter of law that the posts were set within the limits of the highway, if the old fence was located where the witnesses for the state placed it. It did not necessarily follow, because of such finding, that the posts constituted an obstruction, but if the jury became satisfied that the posts were in fact set within the limits of the highway, it might not be apt to draw a refined distinction between what constituted an obstruction and what only amounted to an encroachment. Under the evidence in the case we think a highway by user was established and not one by dedication. Under such evidence its boundaries could have been established by user only. Telling the jury that all the land between certain fences, if they were found to exist, constituted a highway, extended the limits of the road beyond where the evidence warranted its extension. We do not hold

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that the erection and maintenance of fences along either side of the highway may not in any case raise a conclusive presumption of dedication, but we do not think that the evidence here warranted any such presumption, and certainly the bare facts recited in the instruction do not establish one. While the evidence is very uncertain to us upon the existence and location of the fence, it might not have been so to the jurors who were familiar with the road. The fact that the court charged upon the subject indicates that he thought there was some evidence bearing on it, and the charge might well lead the jury into making the same assumption. If the fences in fact existed for the requisite period, the jurors would almost inevitably take into account their own knowledge of the fact. By the instruction complained of the defendant might well be largely deprived of his defense that the posts were not set within the limits of the highway. It is true the jury was told not to convict unless the posts were found to have been placed in the highway in such a manner as to impede, endanger, or seriously inconvenience travel, but we apprehend it is much easier to defend an action of this kind on the ground that the obstacle complained of was without the limits of the highway than it is by attempting to show that the obstacle constituted an encroachment and not an obstruction. In the one case the party justifies his act; in the other he practically admits doing that which he has no right to do, but seeks to minimize his shortcoming. We think the instruction was erroneous.

Other errors are assigned, but they are not likely to arise on a subsequent trial, and no useful purpose would be served by discussing them. Because of the error in giving the instruction under discussion the judgment must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial. The clerk is directed to tax no costs for printing the case, because the same is prepared in manifest violation of the rules of this court.

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PAULY JAIL BUILDING & MANUFACTURING COMPANY, Appellant, vs. COLLINS, imp., Respondent

February 20—March 9, 1909.

Principal and surety: Subcontractor's bond: Release of surety.

1. Whenever a creditor has a right and opportunity to apply property of the principal debtor to the satisfaction or security of the debt, he owes to the surety a duty to do so, and release or waiver of that right to the prejudice of the surety and without his consent will discharge the latter, at least *pro tanto*.
2. A contractor, having the right under his agreement with a subcontractor to discharge the debts of the latter for material or labor out of each instalment when it became due to the subcontractor, or to withhold payment until receipts were produced, released that security and paid the subcontractor without requiring payment for the materials or labor which had been furnished to him. *Held*, that a surety upon the subcontractor's bond was thereby discharged from liability to the principal contractor for sums thereafter paid by him in discharge of claims for such material and labor.

APPEAL from a judgment of the circuit court for La Fayette county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Plaintiff, having a contract for construction of certain county buildings wherein it was bound to complete and deliver the same free and clear of all liens and incumbrances for material and labor, in May, 1898, subcontracted to one Stewart the construction of one of the buildings, adopting in such subcontract the specifications of the original contract. Stewart agreed to deliver the building by September 15th "free and clear of all liens and incumbrances for material and labor," and to give bond conditioned for the "faithful performance of this contract and for the payment of all claims for materials furnished for and labor performed in the construction," etc. The plaintiff agreed to pay $5,500 (increased by extras to $5,900), to be paid on or about the first of each month upon

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estimate by the superintendent of the value for material furnished and labor performed in the construction of the work the preceding month, the payment to be eighty-five per cent. of the estimate, which estimate should include material on the ground as well as wrought into the building, and that upon final completion of the work the balance of the contract price should be paid. It was provided:

"That the just claims of all persons furnishing material for or performing labor in the work embraced in this agreement shall be promptly paid by such subcontractor and receipts therefor delivered to said company [plaintiff], or said company may at its option pay any such claims from the amount at any time due or to become due to said subcontractor under the terms of this contract."

A bond was given, with the defendants as sureties, conditioned as above stated. The work was prosecuted nearly to completion by the subcontractor, in the course of which four estimates were made, and the eighty-five per cent. thereof, amounting to more than $4,200, was paid by the plaintiff directly to the subcontractor without requiring payment for the materials or labor entering into such estimates. In January the plaintiff exercised its right under the contract to suspend the subcontractor and complete the building. There then remained work to be done on the building amounting to less than $300, and there remained unpaid over $1,600 of the contract price; but it was found that a large quantity of material and some labor had not been paid for, amounting to some $2,200, payment of which was demanded from the county and from the plaintiff, and two or three suits were commenced, one by garnishment, and others against the county claiming recovery under sec. 3328, Stats. (1898). The plaintiff paid these bills, amounting, with the expenses of its agent and the cost of completing the building, to $2,700, for the balance of which, after subtracting the $1,600 due on the contract, this action is brought to recover from the sure-

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ties, the subcontractor having become insolvent. Only *Collins* was served with summons.

The trial court on these facts held that the sureties under the terms of the contract and bond were not liable for these bills to subcontractors of the subcontractor for material and labor, and also held that the plaintiff, by paying over to the subcontractor without enforcing its right under the contract to have said money applied in the payment of such bills, had released the sureties, and accordingly entered judgment for the defendant, from which the plaintiff brings this appeal.

The cause was submitted for the appellant on the brief of *Spensley, McIlhon & Priestley* and *E. F. Conley,* and for the respondent on that of *Orton & Osborn.*

Counsel for the appellant cited, among other cases, *Leavel v. Porter,* 52 Mo. App. 632; *Hamilton v. Woodworth,* 17 Mont. 327, 42 Pac. 849; *Mayes v. Lane,* 116 Ky. 566, 76 S. W. 399, 25 Ky. Law Rep. 824; *Marree v. Ingle,* 69 Ark. 126, 61 S. W. 369; *Northern Light Lodge v. Kennedy,* 7 N. Dak. 146, 73 N. W. 524.

To the point that the surety was discharged by the premature payments made to the subcontractor, counsel for the respondent cited *Cowdery v. Hahn,* 105 Wis. 455; *Stephens v. Elver,* 101 Wis. 392; *Shelton v. Am. S. Co.* 127 Fed. 736; *Lucas Co. v. Roberts,* 49 Iowa, 159; *Lawhon v. Toors,* 73 Ark. 473, 84 S. W. 636; *Gato v. Warrington,* 37 Fla. 542, 19 South. 883; *Taylor v. Jeter,* 23 Mo. 244; *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434; *W. W. Kimball Co. v. Baker,* 62 Wis. 526; *Calvert v. London D. Co.* 2 Keen (Eng. Ch.) 638, 644; *Evans v. Graden,* 125 Mo. 72, 28 S. W. 439; *Simonson v. Grant,* 36 Minn. 439; *Bragg v. Shain,* 49 Cal. 131; *Board v. Branham,* 57 Fed. 179; Stearns, Suretyship, 112; *New Haven v. Eastern P. B. Co.* 78 Conn. 689.

DODGE, J. The conclusion we have reached upon one of the several questions discussed is so decisive of the rights of the

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parties as to obviate necessity of treating the others. Conceding for the purposes of argument that the sureties upon this bond became obligated to pay to the plaintiff any sums it might pay in discharge of the principal's indebtedness for material and labor and not merely such as the plaintiff might be compelled or compellable to pay, there arises the other question whether defendant has been discharged from liability by the plaintiff's failure to avail itself of the right given it by the contract to pay all such debts of the principal out of the several instalments due the latter. The rule is abundantly well settled that a creditor owes a known surety the duty to indulge in no transactions or dealings with the principal debtor which shall vary the surety's position or jeopardize him (*Omaha Nat. Bank v. Johnson,* 111 Wis. 372, 87 N. W. 237), and that whenever the creditor has a right and opportunity to apply property of the principal to the satisfaction or security of his debt he owes the surety the duty to do so, and release or waiver of that right to the prejudice of the surety and without his consent will discharge the latter, at least *pro tanto. Price Co. Bank v. McKenzie,* 91 Wis. 658, 65 N. W. 507; *Plankinton v. Gorman,* 93 Wis. 560, 67 N. W. 1128; *Ringenoldus v. Abresch,* 119 Wis. 410, 416, 96 N. W. 817; *Lowe v. Reddan,* 123 Wis. 90, 100 N. W. 1038; *Pierce v. Atwood,* 67 Neb. 296, 93 N. W. 153; *Commercial Nat. Bank v. Henninger,* 105 Pa. St. 496; *German Nat. Bank v. Foreman,* 138 Pa. St. 474, 21 Atl. 20; 1 Daniel, Neg. Inst. § 326*a*. A mere right or privilege as against the principal becomes a duty to the surety when failure to exercise it may prejudice him. In the present case the plaintiff was accorded in the contract the plain right to discharge any and all of Stewart's debts for material or labor out of each instalment which at any time became due him or to withhold the payment until receipts were produced. Most, if not all, of the debts which remained unpaid at the time of the suspension of Stewart existed before either the September 26th or the No-

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vember 4th instalment was paid over and were less in amount than those two payments. Having the money thus in hand and having the right as between itself and Stewart to retain or apply the same in discharge of these debts for material and labor, it released that security and paid the money over to Stewart, whose disposal thereof was of course then beyond the control of either the plaintiff or the defendant. Had plaintiff, on the other hand, exercised its right to withhold enough of these instalments to pay those debts, the balance of the contract price remaining unpaid when Stewart defaulted would have been more than enough to pay the expenses of completing his contract. It is obvious that by such act the defendant suffered prejudice to the full extent of the liability now claimed against him, if liable therefor. *Lucas Co. v. Roberts*, 49 Iowa, 159; *Shelton v. Am. S. Co.* 127 Fed. 736; *McDowell v. Bank of W. & B.* 1 Harr. (Del.) 369. We agree with the trial court that thereby he has been discharged and that the judgment in his favor is correct

By the Court.—Judgment affirmed.

TIMLIN, J., dissents.

SARLES, Administratrix, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

February 20—March 9, 1909.

Railroads: Injury to traveler at highway crossing: Contributory negligence: Duty to look and listen: Unmanageable horses.

1. Where from the time when a traveler on the highway could first, by looking and listening, have known that a train was approaching a crossing in front of him (sixty-eight feet distant, in this case) his horses were so frightened by the train that they were beyond his control and he was unable to stop them or prevent their continuing in their course and colliding with

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the train, he was excused from performance of the usual duty to look and listen and to stop if necessary before attempting to cross the track.

2. To establish that the team was beyond the driver's control in such a case it is enough to show that he was unable, by the use of all reasonable efforts, to control and prevent them, under the impulse of their fright induced by the noise and speed of the train, from proceeding onto the track.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This is an action to recover damages for the death of the intestate, alleged to have been due to the negligence of the defendant.

Frank B. Sarles, the decedent, was instantly killed at the crossing of the defendant's railroad with Park street in the city of Boscobel, August 6, 1906. Park street and the railroad make an acute angle. The course of the railroad is from northeast to southwest. Park street runs north and south. Mr. Sarles approached this crossing from the south, driving his team of horses hitched to a lumber wagon without a box. He sat upon the hounds of the wagon. The train approached from the east. At a distance of from 250 to 300 feet from the crossing he was seen by several witnesses. He seemed to have control of his team and nothing unusual was noticed in their actions. When he was about sixty-eight feet distant from the railroad track he had a view up the track toward an approaching train for a distance of 570 feet. The train was approaching at an excessive and unlawful rate of speed.

The plaintiff avers that the team became frightened at the sight and the noise of the swiftly approaching train within this space of sixty-eight feet, just before or just after it had entered upon defendant's right of way, and that the decedent no longer was able to retain control of the team. Plaintiff claims that decedent could not pull back with sufficient force or divert the team to prevent colliding with the engine on account of its unmanageable condition, the high speed of the

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train, the difficulty of driving upon the roadway because of its narrowness and the ditches on both sides, and because of the unusual difficulties of the situation thus presented.

The defendant avers that the decedent was guilty of contributory negligence. It is claimed that the evidence clearly shows that the team which the decedent was driving was of a gentle disposition, accustomed to and not frightened at trains, and that the decedent, in his hurry to get home and hitch his team to his carriage in order to go to the depot to meet a relative, negligently omitted to look and listen for the approaching train, failed to stop to let the train pass, and thus carelessly collided with it and was killed.

The evidence of some witnesses, who testified to seeing the accident, was to the effect that the team became "scared" and "frightened" after it had come within sixty-eight feet of the tracks. On cross-examination they described the actions of the team as "jumping up and down," "galloping," "prancing," and "dancing up and down." These witnesses did not state positively that the team was running away or was beyond the control of Mr. Sarles, nor did they state that Mr. Sarles had control of the team and was only hurrying.

Defendant's motions for a nonsuit and for a directed verdict were denied and the jury returned a special verdict as follows:

"(1) Did any want of ordinary care upon the part of Frank B. Sarles contribute to produce the accident that caused his death? *A.* No.

"(2) Could Frank B. Sarles, at any period of time from the time he was so near the railroad crossing on Park street that by looking and listening he could have known that a train was coming, have stopped his team or turned them from the railroad track? *A.* No.

"(3) If the court should decide in this case that judgment should go in favor of the plaintiff, what sum should she recover? *A.* Four thousand two hundred and fifty dollars ($4,250)."

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Defendant's motion to change answers in the verdict and for a new trial was denied, and judgment was awarded in favor of the plaintiff. This is an appeal from the judgment on the verdict.

For the appellant there was a brief by *Howe & Gilman* and *Chas. E. Vroman,* and oral argument by *Mr. Vroman.*

For the respondent there was a brief by *W. G. Palmer, J. J. Blaine,* and *Lowry & Carthew,* and oral argument by *Mr. H. E. Carthew* and *Mr. Blaine.*

SIEBECKER, J. The evidence on the question of decedent's care in driving his team and approaching the railroad track presents a conflict and is susceptible of sustaining different inferences. According to some of the evidence the team was in decedent's control at all times up to the point of collision, thus tending to show that he either did not look to observe the approaching train before attempting to cross the track after he was within hearing or seeing distance of it, or that he observed the train and attempted to cross immediately in front of it. In either event he would be guilty of negligence contributing to his death. But, as set out in the statement of facts, there was evidence tending to show that he lost control of his team after he had passed Dr. Armstrong's home, and there was evidence that the horses were then trotting and were under his control. Dr. Armstrong's home is between 250 and 300 feet distant from the railroad crossing. Two witnesses testify that they observed the team when it was approaching the track and was within the space of about 100 feet of it, and that the horses were then jumping and acting as though they were "scared" or "frightened." Deceased appeared to have hold of both lines and was pulling and holding back. The witnesses testify that the horses continued jumping and rearing until the train struck them, and that the horses appeared to have been frightened at the rapidly approaching train. The train was obscured from decedent's view until he

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reached a point sixty-eight feet distant from the track, when he could look up the track a distance of 570 feet. The traveled portion of the approach to the track was narrow, with a ditch on each side several feet deep. From these facts and circumstances the jury were warranted to infer that the horses became frightened at the approaching train when about sixty-eight feet south of the track, that the decedent from that time was unable to retain control of them, and that he could not stop them or divert them from continuing in their course and prevent colliding with the train. Such circumstances present a case where the failure of the driver of a team to look and listen for an approaching train and to stop his team, if necessary for his safety, is excused because the circumstances show that the horses were beyond his control and that he was irresistibly deprived of the opportunity to perform his duty. To establish that the team was beyond decedent's control does not call for a showing that the team was uncontrollable in the sense that they were in a state of frenzy and were running at a very great speed from fright. The team may have been beyond decedent's control in the sense that he was unable, by the use of all reasonable efforts, to control and prevent them, under the impulse of fright induced by the noise and speed of the train, from proceeding onto the track at a time of danger of collision with the train. Such a state of affairs immediately preceding and up to the time of collision constitutes a good and sufficient ground for excusing the driver from the performance of the usual duty to look and listen for the train and to stop, if necessary for his safety, before attempting to cross a railroad track. *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, 46 N. W. 165; *Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142; *Kujawa v. C., M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249. We are of opinion that the trial court ruled properly in submitting this issue upon the evidence.

The contention that the jury's finding in answer to the second question shows that the team was uncontrollable at a

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point so remote from the crossing that it could not have been frightened at the approaching train, and hence that the defendant's negligence was not the proximate cause of the injury, cannot be sustained. There was evidence that the horses were not frightened before they arrived at a point about sixty-eight feet distant from the crossing; that the decedent had control of the horses up to this point; that the horses were not frightened or going faster than a trot until they came close to defendant's right of way; and that at this point they became frightened and unmanageable. The credibility and weight of this evidence were for the jury, and if the jury gave it credence the findings negative the claim that the team became frightened and uncontrollable from some cause other than the train.

These considerations call for affirmance of the rulings of the trial court.

By the Court.—Judgment affirmed.

FORD, Respondent, vs. FREEMAN, Appellant.

February 20—March 9, 1909.

Deceit: Special verdict: Sufficiency: Pleading: Allegation of damage.

1. In an action to recover damages for fraudulent representations whereby plaintiff was induced to purchase mining stock, a special verdict finding that defendant knowingly made the false representations for the purpose of inducing plaintiff to buy the stock, that the plaintiff relied thereon and was induced thereby to buy and pay for the stock, and that he is entitled to recover a certain sum, is *held* to cover the issuable facts and to be sufficient in form.
2. A complaint stating all the other facts essential to a cause of action for fraud and then alleging that plaintiff has been damaged by defendant and deceived by him by reason of the fraudulent statements in a certain sum, and that defendant became indebted to plaintiff in that sum and that said sum is due and owing, and that judgment therefor is demanded, sufficiently alleges damage.

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APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This action was brought to recover damages alleged to have been caused by fraudulent representations inducing plaintiff to purchase stock in a certain mining company. The complaint alleges the representations made and that they were false and the plaintiff deceived thereby; that he had been damaged and deceived by the defendant in the sum of $4,000, and that defendant thereby became indebted to plaintiff in the sum of $4,000; and that said sum is due with six per cent. interest. The answer denies the material allegations of the complaint. The case was tried to the court and a jury. At the close of plaintiff's testimony defendant moved for directed verdict and nonsuit, both of which motions were denied. The jury returned the following verdict:

"(1) Did the defendant, *C. H. Freeman,* knowing that the statement was false at the time he made it, state and represent to the plaintiff, *C. M. Ford,* on or before January 20, 1906, that three others and himself had each subscribed for $2,500 of the stock of the Bankers' National Development Company, and had each paid in cash his subscription into the treasury of said company, and that the sum of $10,000 in cash was then in said treasury? *A.* (by the court.) No.

"If you answer the above question 'No,' do not answer the succeeding questions numbered 2 and 3. If you answer No. 1 'Yes,' answer said succeeding questions.

"(2) Did the said defendant make such false representation to the plaintiff to induce him to purchase the stock of said company? *A.* ——.

"(3) Did the plaintiff rely upon such false representation, and was he induced thereby to buy 1,000 shares of the stock of such company and to pay therefor into the treasury of said company the sum of $1,000? *A.* ——.

"(4) Did the defendant, *C. H. Freeman,* between January 20 and February 19, 1906, knowing that the statement was false at the time he made it, state and represent to the plaintiff, *C. M. Ford,* that three others and himself had each bought of the stock of said company shares to the amount of $15,000,

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and had paid that amount in cash into the treasury of said company for the same, and that there was then in the treasury of said company the sum of $60,000 in cash? *A.* Yes.

"If you answer the fourth question 'No,' you will not answer the succeeding questions numbered 5 and 6. If you answer the fourth question 'Yes,' answer such succeeding questions.

"(5) Did the said defendant make the false representation to the plaintiff found by you to have been made by your answer to the fourth question to induce the plaintiff to purchase 3,000 additional shares of the stock in said company? *A.* Yes.

"(6) Did the plaintiff rely upon such last named false representation, and was he induced thereby to buy 3,000 shares of the stock of said company and to pay therefor into the treasury of said company the sum of $3,000? *A.* Yes.

"If you have answered both the first and fourth questions 'No,' you need not answer the next question. If you have answered both or either of them 'Yes,' answer the next question.

"(7) If upon the testimony and your findings the court should direct judgment for the plaintiff, what sum do you find that he is entitled to recover? *A.* $3,333.33."

Motions by defendant on the verdict were denied and judgment ordered for plaintiff on the verdict, which was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *W. H. Beebe, Geo. B. Clementson,* and *Lowry & Carthew,* and oral argument by *H. E. Carthew.*

The cause was submitted for the respondent on the brief of *T. L. Cleary* and *A. W. Kopp.*

KERWIN, J. Several errors assigned involve the question of the sufficiency of the evidence to support the verdict. The argument is made by counsel for appellant that there was not sufficient proof of the representations nor that the plaintiff relied upon them. We do not regard it necessary to spend any time upon this point, because, after careful examination of the testimony, we are satisfied that there is abundance of evi-

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dence to support the verdict as to the question of making the representations and the reliance upon them by plaintiff. It appears that a fraternal relation existed between plaintiff and defendant, they being members of the same lodge, and that plaintiff reposed special confidence in the defendant, and, as the evidence shows, was very largely influenced in the matter of making the investment in consequence of such relation and reliance which he placed upon the statements made by defendant in consequence of such relation.

Errors respecting the refusal of the court to change answers of the jury to questions of the special verdict also involve the sufficiency of the evidence, and upon this point it is only necessary to say that we are convinced the questions of the special verdict assailed are fully supported by the evidence.

Another error assigned covers the defendant's motion for a new trial upon the ground, in addition to those heretofore stated, that the complaint does not state facts sufficient to constitute a cause of action; that the special verdict is insufficient; that the court erred in its charge to the jury; and that the verdict is contrary to the law and the evidence. The want of sufficient evidence to support the verdict seems to be appellant's principal contention for reversal. The verdict covers the issuable facts in the case, is sufficient in form, and supported by the evidence. We find no error in the charge.

The complaint clearly contains all the allegations essential to make a good complaint for damages for fraud. But it is argued it contains no allegation of damages. The facts are set up in the complaint, and it is averred that the plaintiff has been damaged by the defendant and deceived by him by reason of the false and fraudulent statements in the sum of $4,000, and that the defendant became indebted to plaintiff in that sum, and that said sum is due and owing, with interest, and demands judgment for $4,000. It is insisted that there is no proof that the stock purchased by plaintiff through the fraud of defendant was not of value. Upon this point the

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evidence is conflicting, and the finding of the jury as to the amount of the damage is conclusive upon this point. We find no error in the record and think the judgment below right.

By the Court.—The judgment of the court below is affirmed.

ST. ANTHONY MINING AND MILLING COMPANY, Respondent, vs. SHAFFRA and another, Appellants.

February 20—March 9, 1909.

Mining rights under license or lease: Revocation: Statute construed: "Crevice or range:" "Discovery:" Presumptions: Notice to quit: Immaterial defects.

1. The words "crevice or range" in sec. 1647, Stats. (1898), are equivalent to "lode or vein," the word "range" being limited by its associated word, "crevice," which has been defined to mean a mineral-bearing vein.
2. Under sec. 1647, Stats. (1898), a miner entering upon land under a mere license or lease, revocable at the will of the lessor or licensor, has the right, if he strikes a prospect, to continue his exploration sufficiently to determine whether it will lead to a discovery or not; and if he discovers a crevice or vein he may follow that deposit of ore, within the lines of the land upon which he was licensed to work, lengthwise, sidewise, and downward until he has exhausted the crevice or vein; and the landowner cannot in the meantime revoke the license or lease unless the miner forfeits his right as provided in secs. 1647, 1649.
3. The word "discovery" in such statute must have a reasonably strict construction.
4. The evidence in this case is *held* not to show "the discovery of a crevice or range," within the meaning of sec. 1647, Stats. (1898), but merely the development and uncovering of a pocket or deposit of zinc ores near old workings and being part of the same mineralized band or zone running through a known mineral-bearing lot.
5. If, from long-continued possession and working of land for mining purposes by licensees and those claiming under them, it could in any case be presumed that there had been a discovery of a crevice or range and that they were in possession pursuant

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thereto, the evidence in this case as to the known mineral-bearing character of the land, the old workings theretofore discontinued, and the miners' description of the land and of their operations thereon, negative such presumption.

6. Where the answer in ejectment claimed that defendants had an irrevocable mining license and denied plaintiff's title to the ore and its right of possession, formal defects, if any, in a notice to quit given to the defendants, but not before the court on appeal, are not available to reverse a judgment for the plaintiff.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Platt Whitman* and *Aldro Jenks,* and oral argument by *Mr. Jenks.* They cited, among other authorities, *Ill. S. Co. v. Jeka,* 119 Wis. 122, 95 N. W. 97; sec. 1647, Stats. (1898); *Sobey v. Thomas,* 39 Wis. 317; *Book v. Justice M. Co.* 58 Fed. 106; *Cascaden v. Bartolis,* 146 Fed. 739; *Lange v. Robinson,* 148 Fed. 799; *Tipping v. Robbins,* 71 Wis. 507, 37 N. W. 427.

George B. Clementson, for the respondent, cited *Ganter v. Atkinson,* 35 Wis. 48; *De Pere Co. v. Reynen,* 65 Wis. 271, 22 N. W. 761, 27 N. W. 155; *Furlong v. Garrett,* 44 Wis. 111; *Sydnor v. Palmer,* 29 Wis. 226; *Meyer v. Hope,* 101 Wis. 123, 77 N. W. 720; *Raisbeck v. Anthony,* 73 Wis. 572, 41 N. W. 72.

TIMLIN, J. The appellants claim to be entitled to the possession for mining purposes of two lots designated respectively, for convenience, as the Delaney lot and the Stephenson lot, and base that claim upon a parol license from the former owners of these lands to some remote predecessors in occupation under whom appellants claim by relinquishments, parol transfers, and succession in occupation and use for more than twenty years next prior to the commencement of the action. During all this time the appellants and their said predecessors in occupation, by payment of tribute, royalty, or rent, consisting of a fraction of the ore mined or raised, recog-

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nized the paramount title of the owners in fee, and they now recognize such paramount title, but claim that under ch. 75, Stats. (1898), formerly ch. 260, Laws of 1860, and ch. 117, Laws of 1872, they have acquired a right to hold and enjoy the possession of said lots for the purpose of mining thereon upon payment of tribute or royalty to the fee owners, and that the lapse of time has prescribed any remedy of the fee owners to treat them otherwise than as such possessors. Some criticism is made upon the fee title of the respondent, but we are assured by appellants' brief that they make this criticism merely for the purpose of challenging the sufficiency of the notice to quit served upon them by respondent, and do not wish otherwise to deny that the respondent is the owner of the title in fee subject to appellants' rights as licensees for the purpose of mining and removing the ore. We shall therefore take it for granted that the respondent has title in fee to the lots in question.

Ch. 75, Stats. (1898), is in many respects a very peculiar statute, and its provisions, as well as its peculiar use of mining terms, indicate a local origin. It applies only to mining contracts and leases for the digging of ores and minerals, viz.: (1) licenses or leases "verbal" or written made to a miner; (2) only where there is no contract between the parties contrary to its provisions; (3) only where there are no terms established by the landlord contrary to its provisions. The class of contracts affected is consequently very narrow. But with regard to a contract which does fall within its provisions the latter are quite sweeping. Such lease or license as does fall within the purview of the statute shall not be revocable by the maker thereof (1) after a valuable discovery has been struck; (2) after a valuable prospect has been struck; (3) but if the miner shall forfeit his rights by negligence such as establishes a forfeiture according to mining usages, then the "maker" of the lease or license may revoke it notwithstanding a valuable discovery or a prospect "has been

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struck." This appears to permit revocation after discovery for a particular cause, but whether or not the cause exists is to be determined by proof of mining usages. Sec. 1649, Stats. (1898), provides, however, other causes for forfeiture of such license or lease after discovery, viz.: (1) concealing or disposing of ores or minerals, or (2) concealing or disposing of "mines or diggings" for the purpose of defrauding the lessor of his rent, and (3) neglect for three days after notice and claim of rent to pay rent on ores or minerals "raised" by the tenant or licensee. Having thus fixed the legal effect of the class of licenses and leases above described with reference to possessory rights, the statute further declares, "the discovery of a crevice or range containing ores or minerals shall entitle the discoverer to the ores or minerals pertaining thereto, subject to the rent due his landlord, before as well as after the ores or minerals are separated from the freehold." The words "crevice or range" are probably here used with some local significance, because the word "range" as applied to mineral deposits is commonly understood to designate a large stretch of country, often many miles in length and of considerable width, carrying with some continuity or at intervals ore deposits belonging generally to the same geological stratum. A "crevice," on the other hand, is a word sometimes applied to a mineral-bearing vein. In *Raisbeck v. Anthony,* 73 Wis. 572, 586, 41 N. W. 72, these two words were considered to be equivalent to the expression "lode or vein," thus limiting the word "range" by its associated word, "crevice," which latter word has been defined to mean mineral-bearing vein. *Beals v. Cone,* 27 Colo. 473, 62 Pac. 948, 958; *Van Zandt v. Argentine M. Co.* 8 Fed. 725; *Terrible M. Co. v. Argentine M. Co.* 89 Fed. 583. It is somewhat questionable whether this construction of the words "crevice or range" is the most appropriate to the conditions existing in the lead and zinc mining regions of Wisconsin, because such mineral deposits might not be aptly described in that way. Wis. Survey Bull. No. 9,

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St. Anthony M. & M. Co. v. Shaffra, 138 Wis. 507.

Lead and Zinc Deposits (1903). But the construction thus placed upon the statute has stood for twenty years and we do not feel authorized to change it.

The purpose of the statute seems to be to give the miner who is operating under a lease or license from the owner of the land, terminable at the will of the latter, the right, in case he discovered a prospect, to continue his exploration free from any right of the lessor or licensor to cut him off by revocation before the prospect so discovered was explored sufficiently to determine whether it would lead to a discovery or not, and in case he discovered a crevice or vein to entitle him to follow that deposit of ore within the lines of the land upon which he was licensed to work lengthwise, sidewise, and downward until he had exhausted the crevice or vein, paying the agreed or customary tribute or royalty to the landowner in the meantime. Thus a miner entering under a mere license or lease, revocable at the will of the lessor or licensor, by discovery became entitled to all the rights which he would have, had the license or lease in the first place had incorporated into it the terms of this statute.

Under such a statute the word "discovery" must in the interest of certainty of titles have a reasonably strict construction. In *Raisbeck v. Anthony, supra,* it was held that the location of a new deposit of ore further along the vein and in the direction of the extension of an exhausted deposit and between the same rock walls was a continuation and expansion of the same vein, which had pinched out where the former workings were abandoned, and not the discovery of a crevice or range within the meaning of this statute. That was rather a stronger case for the licensee than the case at bar, and if that case be accepted as law the defendants in this case have not brought themselves within the statute. For, as we view the evidence, the lots in question were known mineral ground and had been worked and mined long prior to the inception of defendants' license. The defendants or their predecessors in

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occupation uncovered and raised some ores of zinc called "dry bone" and "jack" which were valuable and marketable, but the evidence leads us to believe, as it led the circuit court to believe, that this was the development and uncovering of a mineral deposit in a known mineral-bearing lot and alongside of the old lead diggings, rather than a discovery of a crevice or range, vein or lode. They do not bring their act of uncovering or disclosing this deposit within the proper meaning of the word "discovery" as used in this statute, nor do they bring that which they uncovered and disclosed within the meaning of the words "crevice or range." The evidence rather shows it to be a pocket or deposit some distance from the old workings, but part of the same mineralized band or zone running through these mineral-bearing lots. In one sense of the word it was a discovery that the particular ore was at that identical spot and not elsewhere, but it was not the discovery of a crevice or range.

With reference to appellants' claim that by reason of long-continued possession for mining purposes by them and by those under whom they claim the court should presume that there had been a discovery of a crevice or range and that they were in possession pursuant to that discovery, not yet having exhausted the crevice or range, we must say that the evidence as we understand it negatives such a claim. The known mineral-bearing character of the land, the old workings theretofore discontinued or abandoned, and the appellants' description of the land and their operations thereon and the deposit uncovered negative such presumption, if we were permitted to indulge such presumption in any case. We may add that it is quite difficult to fit a presumption of this kind to a statute which gives possession for a limited time and only for the purpose of mining out a certain crevice and dependent upon practically continuous mining and payment of rent. But it may not be impossible in a proper case.

With reference to the notice to quit or revocation of appel-

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lants' license, we have no copy of the same before us, and the fact that such notice was given appears only by testimony of the defendants elicited upon cross-examination. The answer of defendants claimed an irrevocable license by reason of the discovery of a crevice or range by their predecessors and denied the respondent's title to the ore and its right of possession. Formal defects in the notice to quit, if such existed, were under these circumstances not available to the appellants for the purpose of reversing the judgment.

By the Court.—The judgment of the circuit court is affirmed.

ELLIS, Plaintiff in error, vs. THE STATE, Defendant in error.

February 22—March 9, 1909.

Criminal law: Receiving deposits in insolvent bank: Statute construed: Deposit of check as money: Indictment: Officer of bank receiving deposit: What constitutes a deposit: Deposit by debtor of bank: Insolvency: Evidence: Value of assets: Relevancy: Reputation as to financial standing: Presumption as to continuance of condition: How far retroactive: "Unsafe or insolvent."

1. If a person deposits in a bank for his credit a check, and it is presently treated between such person and such bank as money, the former obtaining credit upon which he may, at his pleasure, draw for money, sec. 4541, Stats. (1898), is satisfied, as regards a deposit of money.
2. A charge in an indictment or information under such section, that a particular person deposited in a specified bank, for his credit, a check on another bank and that it was received for the bank by its president, naming him, and accepted on deposit, satisfies all the essentials of such section as to an officer of a bank, in his capacity as such officer, accepting or receiving money on deposit.
3. In case of an officer of a bank accepting for such bank money of another to be, and which is, deposited for his credit to be at his pleasure drawn on, the status of such officer as regards sec. 4541, Stats. (1898), is thereby fixed regardless of whether the depositor owes the bank on paper, due to and which does

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mature shortly so as to absorb the deposit, in part, before the bank is forced to suspend.

4. In case of a person depositing money in a bank as against an existing overdraft, so far as it goes in discharge of such indebtedness, it is not a deposit within the meaning of sec. 4541, Stats. (1898).
5. The call of the statute, as regards the act constituting a criminal fraud, is a deposit such as will create a credit; the relation of debtor and creditor between the parties, or that of bailor and bailee or that of principal and agent.
6. Evidence of the reputation of a person as regards financial standing is relevant.
7. Evidence of the value of commercial paper based wholly on ignorance of the witness as to whether the maker possesses any property liable to execution, is not relevant, on the subject of the solvency of the maker.
8. "When the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question."
9. No presumption is raised in the manner aforesaid which is materially retroactive.
10. Proof of insolvency at a particular time does not create a presumption that the same condition existed at any considerable time anterior thereto, nor is it evidentiary of such condition at a time very remote from that to which the evidence is directed.
11. Proof that a person was insolvent at a particular time by means of judgments against him shown at such time to be uncollectible, as circumstantial evidence that he was insolvent six months or more prior thereto, especially in case of his having shortly after the earlier date transferred his property for the purpose of securing payment of his obligations, is not relevant.
12. Within reasonable limits under reasonable circumstances proof of insolvency of a person at a particular date as circumstantially bearing on like insolvency at an earlier date, is relevant.
13. Whether evidence of the nature mentioned in the last foregoing is relevant or not, raises, primarily, a question of competency, in which field the decision of the trial court should not be disturbed on appeal unless clearly wrong.
14. In the situation suggested in the last foregoing, if the prior date under all the circumstances is too remote to permit of the circumstance of insolvency at the later date having reasonably any evidentiary significance, it is irrelevant.

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15. In case officers of a bank are largely indebted thereto and possess property interests in a corporation to a very significant amount as compared to such indebtedness, and they convey such property to the bank on account of such indebtedness, pursuant to an understanding of long standing, the situation before the conveyance should be regarded substantially the same as that thereafter, as regards the mental state of such officers respecting the condition of the bank as to solvency.
16. In the situation in the last foregoing the fact that some of the officers, equally interested in the bank and the outside property mentioned, are not debtors of the bank but have, nevertheless, agreed with their associates to join in conveying such property to strengthen it as to paper on which they were not liable, creating a moral obligation, only, to so join, which obligation the other officers have good reason to suppose will be, and in fact is, redeemed, does not militate against the outside interest of such nondebtor officers being considered by the others, before the transfer, on the question of whether the bank is solvent.
17. The words "unsafe or insolvent" in sec. 4541, Stats. (1898), are used therein as legal equivalents.
18. The term "unsafe or insolvent" as used in sec. 4541, Stats. (1898), does not mean insolvent in the limited sense of inability to pay indebtedness in the ordinary course of business.
19. The term mentioned means insolvent in the broad general sense of a deficiency of one's assets in realizable cash available within a reasonable time, treated as an ordinarily prudent person would generally conduct his business under the same or similar circumstances, to pay his liabilities.
20. A bank is unsafe or insolvent within the meaning of the statute when the cash value of its assets, realizable in a reasonable time, in case of liquidation by its proprietors as ordinarily prudent persons would ordinarily close up their business, is not equal to its liabilities, exclusive of stock liabilities.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Writ of error to review a conviction for the offense of receiving money into a bank for the credit of a depositor with knowledge, or good reason to know, that the bank was unsafe or insolvent, contrary to sec. 4541, Stats. (1898).

The accused, during the time stated in the indictment, was president of the Security Savings Bank, a duly organized

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banking corporation under the laws of this state, located at Ashland, Wisconsin.

The indictment contained three counts, each for a violation of sec. 4541, aforesaid. The first was for receiving into the bank January 29, 1904, of A. L. Goodman, $125 in lawful money for his credit. The second was for so receiving February 2, 1904, a check for $1,000 of that value for credit of A. Donald. The third was for so receiving February 8, 1904, money and bank checks of the value of $59.65 from W. T. Briggs for his credit.

As to each alleged violation of law it was charged the accused received the deposit as president of the bank, knowing, or having good reason to know, that the bank was unsafe and insolvent.

The case was duly tried on a plea of not guilty. Questions discussed in the opinion were in due form saved for review.

The bank was duly incorporated September 10, 1903, as successor to a banking business previously conducted by a partnership composed of the accused, his brother, E. H. Ellis, and his sisters, Danielia Loranger and Augusta Kennedy. Prior to such date the capital was $20,000 and business was dominated by the accused, he being supposed by the public to be substantially the sole owner. In the new organization the four persons named took the stock in equal proportions, except one share taken by Ellis Kennedy, son of Augusta Kennedy.

The stock was fixed at $50,000. The corporation started business with a duly approved paid-up capital of that amount. All assets of the private bank were turned over to the new organization and it assumed the liabilities. From the time of the new organization to the time it closed February 13, 1904, by reason of general disturbed financial conditions, some special local disturbances, and other causes, patrons of the bank withdrew credits to the extent of about one third, the

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deposits being reduced from $162,560.97 to $107,000 or thereabouts. Prior to the day named the proprietors partially arranged to borrow on assets of the bank $35,000, thinking that amount would tide over the difficulties, but before concluding to secure the money a consultation was had with the bank examiner, who, after an examination of the affairs of the bank, approved of its continuing, if, in the judgment of the proprietors, the $35,000 would so strengthen the reserves as to provide against a continuation of the reduction of deposits. Not feeling certain in that respect, the proprietors concluded to go into liquidation and the bank was closed accordingly, control of it being turned over to the bank examiner. At such time the amount of assets was $231,006.05 and liabilities other than to stockholders $108,270.46. The assets of the bank on February 3, 1904, and for a considerable period prior thereto, consisted of commercial paper around $75,000 in amount, which depended, for its value, in the main, upon responsibility of the accused, E. H. Ellis, and Ellis S. Kennedy, real-estate mortgage security as to Kennedy's indebtedness, and a moral obligation hereafter explained as to some indebtedness of George C. Loranger. Of this paper $6,300 was the obligation of George C. Loranger, on which the accused was liable as an indorser, $1,100 was paper of one Holbrook, son-in-law of the latter, and $12,500 of E. S. Kennedy, son of Augusta Kennedy. On such day the stockholders of the bank were proprietors of the stock of the Bay City Land Company in the same proportion as they were of the stock of the bank. Danielia Loranger, one of such stockholders, had verbally promised to convey her interest in the land company to the bank to care for the indebtedness of her husband to the bank and the indebtedness of Holbrook, and all the stockholders of such company understood from the time of the organization of the bank that the company's property should be devoted to the interests of the bank. The value of the obligations of Mr. Loranger, the Ellises, and E. S. Kennedy on such

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day depended, in the main, except as to the real-estate security mentioned, upon the responsibility of the stockholders in the land company and the moral obligations of Mrs. Loranger and Mrs. Kennedy to devote their interests in such company to those of the bank. Pursuant to such obligation the land company's assets, consisting of real estate of the assessed valuation of about $72,000, were conveyed to the bank. It had all such property at the later date when the bank was taken possession of by the bank examiner.

The evidence established all the matters aforesaid without dispute and further so established that the business of the bank was conducted without any refusal to pay any legitimate demand upon it up to the time it closed as aforesaid without supposing liquidation would be necessary, up to the time of the conference with the bank examiner aforesaid. There was further undisputed evidence that the value of the assets of the bank on the day of the closing and on and after February 3 and 4, 1904, was somewhere around $160,000, as the same was reasonably viewed at the time, and that such value existed on the 29th day of January, 1904, and thereafter up to and inclusive of February 2, 1904, contingent upon the responsibility of the stockholders of the land company being such, by reason of their ownership of the stock of such company, as to render their obligations to the bank substantially as good before the assets of the land company were turned over to the bank as thereafter. The evidence was further undisputed that, viewing the assets of the bank during the period from January 29, 1904, to and inclusive of February 13, 1904, exclusive of the land company's property and the obligations on account of which the same was turned over to the bank, they were of the value of at least about $188,000, or enough to cover the liabilities into about $20,000, and that, taking the property of the land company at the value placed thereon by the witnesses, or taking the value of the paper, on account of which such property was turned over to the bank, at substan-

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tially equal to the value of such property as so placed, there was a surplus of assets over liabilities, at each of the times material under the information, of somewhere around $50,000.

There was no evidence indicating that, on either of such dates, the proprietors of the bank contemplated going into liquidation, or had any thought other than that the bank would remain indefinitely in business. There was evidence that at the time the bank was examined by the bank examiner, just previous to his taking possession, he was of the opinion there were assets sufficient to pay the liabilities, especially, except stock liabilities, and that he was of the opinion, when the bank closed, the proprietors did not believe but that there were assets sufficent to pay out, in money, all liabilities to depositors.

There was evidence to the effect that, when the deposit was made, mentioned in the first count of the indictment, the same was placed to the credit of the depositor, who at that time owed the bank a considerable amount, but that none of it was then due. The evidence as to the deposit mentioned in the second count was to the effect that it was treated as cash, the amount the check called for being placed to the depositor's credit, and that the check was afterwards paid to the bank.

There was evidence to the effect that for a considerable time before the occurrence mentioned in the indictment, and up to the time the bank closed, the law was not complied with as to reserves; also evidence that some overdrafts were allowed, there being such at the time of the suspension to the amount of about $4,000, about $900 of which was against responsible persons other than the proprietors of the bank, and $1,700 only good, so far as the responsibility of the proprietors of the bank would make it so, either as owners of the property of the land company or as having turned such property over to the bank, leaving about $1,600 of overdrafts of no value.

There was other evidence as to want of good judgment in

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the conduct of the bank, and evidence that after the proprietors had turned all their money over thereto, as they did, nothing could be collected of them.

The cause was submitted to the jury, resulting in a verdict of guilty on the first and second counts and not guilty on the third. The various exceptions saved upon the trial will be mentioned in their order of importance in the opinion.

For the plaintiff in error there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *A. W. Sanborn* and *B. W. Jones.*

For the defendant in error there was a brief by the *Attorney General, V. T. Pierrelee,* district attorney for Ashland county, and *M. Barry,* assistant to district attorney for Ashland county, and oral argument by *Mr. Pierrelee* and *Mr. Barry.*

MARSHALL, J. In the foregoing statement we have avoided going into details or dealing much with figures, except in the way of generalizations. There is such a mass of things in the record that any attempt to state it in detail would fail of accomplishing any valuable purpose and probably would leave the situation more or less involved in confusion.

The legal questions are few in number and will be presented in their logical order.

The fact that the deposit relied upon in the second count in the indictment was a check does not militate against its satisfying the call of sec. 4541, Stats. (1898), for a deposit of money. True, the check, as it went over the counter, was not money, but it was treated as such between the bank and its customer. It was taken as the equivalent of money at the face value. The money equivalent was placed to the credit of the depositor the same, in all respects, as if legal tender money had been passed over the counter. The relation of debtor and creditor, as between the bank and the depositor, with the characterization of liability on the one side and expectancy on

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the other as to payment on demand at any time during banking hours, was created. In short, the transaction, in practical effect, was the same as if the bank had passed to its customer $1,000 for the check and he had immediately passed the same back for deposit and received credit therefor.

The foregoing, in the opinion of the court, is in harmony with—and really required by the rule of *stare decisis* on account of—*State v. Shove,* 96 Wis. 1, 70 N. W. 312. We cannot appreciate that there is any difference between passing a certificate of deposit on a bank over its counter for credit or a renewal, the presumption being that money equivalent for such certificate is on hand to be passed out in exchange for the paper if desired, and passing over the counter a certificate of deposit or check or bill of exchange on another bank, which is taken as so much money in the ordinary course of business, the money itself being, presumably, present to be transmitted, if desired, in exchange for the paper. To say there is a difference in the two situations would, in our opinion, be trifling with the statute.

It is confessed that the indictment, in substance and practical effect, is the same as in *State v. Shove, supra,* but insisted that, as no point was made on the sufficiency of the charge in such case, the way is clear for a challenge in that regard now. Granted, for the purpose of the discussion. The following defects are now suggested: (a) It does not appear from the charge that the bank became the debtor of the depositor named in the first count. (b) It does not appear that the deposit consisted of money. (c) It does not appear that *Ellis* received the deposit for the bank.

The requisite of the statute as to (a) and (b), so far as is necessary to this case, is acceptance or reception on deposit of money tendered for that purpose by a customer. That is plainly charged in the first count in the language of the statute, and is likewise so charged in the second, in the light of what we have said as to the reception of the check as money,

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being the same as if the thing passed over the counter had been money, in fact.

(c) The claim that the indictment does not show that the accused acted, in receiving the deposits, for the bank, seems to be without merit. After charging receipt of money on deposit, in the one case, and the check in the other, the language of the indictment, as to each, is, substantially, that the accused was, at the time of receiving the deposit, the president of the bank and the money was accepted and received into the bank on deposit. What more is needed? We cannot discover anything wanting.

The fact that the customer mentioned in the first count was indebted to the bank at the time he made his deposit, especially, since the indebtedness was not presently due, does not militate against the receipt of the money satisfying the statute as to that element. The credit created by the deposit was at the customer's disposal immediately upon its creation. The status of the accused was fixed, as regards guilt under the statute, the instant the deposit was accepted as creating a credit, liable to be called for at once, and was not subject to change by maturity of the depositor's indebtedness thereafter, before the bank closed, so as to absorb a part or the whole of it. Had the deposit been made on account of the indebtedness about to mature, and to be applied thereon, or made on account of an overdraft, so as to operate to discharge the depositor's indebtedness to the bank, the case would be far different. True, it would be absurd to hold that a deposit, in form, which, in practical effect, is only payment of an indebtedness on an overdrawn account, would satisfy the statutory call for a deposit of money or other thing used as money and subject to be recalled in money. Such call contemplates a deposit such as will create the relation of debtor and creditor between the parties, or bailor and bailee, or the relation of principal and agent, the former only being material to this case.

A witness who, upon the *voir dire,* was supposed to have

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shown special knowledge of the character of commercial paper made by parties in the city of Ashland and its vicinity, was permitted to give his opinion, generally, of the value of specific pieces of paper mentioned to him, about the time of the occurrences, material to the case. He was not asked as to whether he knew the reputation of the maker or indorser of the paper as to solvency, but as to the value of the paper as a commodity in the community, from the standpoint of whether the parties named, to the knowledge of the witness, had any property out of which the same could be collected. He stated, definitely, that his testimony was based, not on knowledge of whether the parties possessed property or not, but on ignorance of whether they had any. The motion made to strike out such testimony should have been granted. True, if the witness had shown, with any degree of fairness, on the *voir dire*, that he knew the reputation of the makers of the paper for solvency, he might have been permitted to testify to such reputation. True, evidence of the general reputation of a person for financial responsibility is relevant on the question of his solvency. That does not seem to have been directly passed upon by this court, but it has by many, and may be said to be entirely settled, though not by universal authority. We will not go into the subject at length but state, with approval, that the rule is as indicated. The following are a sample of a multitude of judicial authorities on the subject: *Hahn v. Penney,* 60 Minn. 487, 490, 62 N. W. 1129; *West v. St. Paul Nat. Bank,* 54 Minn. 466, 56 N. W. 54; *Angell v. Rosenbury,* 12 Mich. 241; *Bank of Middlebury v. Rutland,* 33 Vt. 414.

The evidence discussed was not of the character of opinion evidence as to reputableness for solvency. True, on cross-examination there was some evidence from the witness that he testified, from reputation, as to the financial standing of one maker of a note brought to his attention, but, in general, his evidence was confined to opinions on the basis before indi-

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cated. He gave no evidence that he, in fact, knew whether the debtor had property or not. On the whole, it seems that the evidence was not relevant. It did not approach near enough to the real point at issue to have sufficient probative force to be within the realms of competency. Therefore, in the opinion of the court, it should have been stricken out as indicated.

Complaint is made because the court permitted much evidence as regards financial condition of debtors of the bank, particularly the proprietors, long after the suspension, without direct proof that the same condition existed at the time of the occurrences charged in the indictment. A judgment against the accused for $32,526.33 in favor of the receiver of the bank, rendered some six months after the suspension, covering substantially all the liabilities of the accused to the bank, was received. Similar proof was made as to other debts to the bank in connection with evidence of unsuccessful efforts to collect on the judgments. Much of this evidence, so far as direct effect was concerned, related to the condition of things from six months to some over a year after the deposits were alleged to have been wrongfully received.

It is an elementary principle of evidence that, as a general rule, presumptions do not run backward; that while "when the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question" (*State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; 1 Greenl. Ev. § 41),—there is no retroactive evidentiary inference, especially reaching backward, materially. So, proof of insanity or insolvency at a particular time, is not competent to prove, on the principle of natural and probable relation, the same condition a considerable period prior thereto. But the question of whether a circumstance is of sufficient probative force to have the dignity of a

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legal presumption of fact, establishing the matter in controversy, *prima facie,* as in case of the rule stated, is one thing, and that of whether it is so utterly void of probative power as to be outside the realms of competency and so irrelevant, is quite another.

It must be conceded that, while evidence of the character of that in question might not establish a condition which would raise a legal presumption running backward, if the condition were not too remote it would not be entirely without evidentiary consequence. Such consequence might be considerable under some circumstances. For instance, in case of proof of entire want of assets to meet liabilities a few days after the particular time vital to a controversy. It would, necessarily, diminish in weight, according to remoteness, and eventually become so shadowy as to pass into the realms of conjecture, and so outside the field of competency, thereby becoming wholly irrelevant. Within a considerable field, the primary question, as to admissibility, would be one of competency, in which field, as in all others where the trial court is required to determine matters of fact, there is a broad range for the exercise of judgment, in which the trial court is quite supreme, so much so, that its rulings should not be disturbed unless clearly wrong. *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145; *Johnson v. State,* 129 Wis. 146, 152, 108 N. W. 55.

It is the opinion of the court that considerable of the evidence objected to was improperly received under the principles suggested; particularly, judgments against persons who, before the suspension, divested themselves of all of their property, by turning it over to the bank on account of the very indebtedness represented by the judgments subsequently rendered, and, further, in view of the failure of counsel to make good the pledge given to the court at the time the evidence was received, that evidence would be offered that there had not been any substantial change in the financial condition of

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the persons, to whose status the remote evidence related, from the time of the occurrences charged in the indictment down to the time of the remote condition proved, or attempted to be proved. These general observations are all that seems necessary on this branch of the case.

The trial court gave instructions excepted to, and refused to give instructions requested, upon the theory that, the value of the property of the land company turned over to the bank, on account of liabilities of the stockholders, in the main, February 3, 1904, could not be considered on the question of whether the bank was unsafe or insolvent to the knowledge, or with good reason for knowledge, on the part of the accused, at any time prior to such date, but could be from and thereafter. That, it seems, was manifestly wrong, and a wrong which, quite likely, was fatal to the accused, as to the first and second counts, inasmuch as, while the accused was acquitted as to the circumstance that happened a few days after the land company's property was turned over to the bank, he was convicted as to that which happened the day before and the one which happened five days before.

It seems that, aside from the interest which Mrs. Loranger and Mrs. Kennedy had in the land company, such company's property, from a legal standpoint, was behind the liability of the debtor stockholders of the bank, substantially the same on the 29th day of January, 1904, as on the subsequent dates material to the case. Since there was an understanding prior to the 29th, to which Mrs. Loranger and Mrs. Kennedy were parties, that all the land company's property should be turned over to the bank on account of the liabilities of the stockholders thereto to strengthen its resources, and particularly as the accused had, as it seems, sufficient influence with his associates to secure their co-operation as to anything he desired done to strengthen the bank,—he had substantially the same reason on January 29 to consider the value of the land company property with reference to the

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solvency of the bank, as at any later time. In the light of the result of the trial as to the third count in the indictment, it seems reasonably certain that had the case been presented to the jury in this way, there would have been a verdict of not guilty on all the charges. There can hardly be any mistake about that in view of the undisputed evidence that, considering the land company property, the cash value of the bank assets, at the times in question, as the accused had a right to view them, exceeded the liabilities to depositors by about forty per cent.

On the question of whether there was the excess stated, we have little or no doubt. We have checked over carefully the claim in that regard by counsel for the accused, and find it substantially correct. There is no substantial claim to the contrary in the brief of counsel for defendant in error. On the oral argument counsel were pointedly challenged in respect thereto several times from the bench, and, while they did not concede there was such excess, their attitude was such as to suggest, very strongly, that they were not prepared to more than deny that there were assets of a convertible character sufficient to enable the bank to meet its liabilities in the ordinary course of business, or enough to pay anywhere near all the debts, as it turned out.

The latter condition mentioned is not very persuasive as to the condition of mind of the accused, or the knowledge he should have had on the 29th day of January, 1904. It is a matter of common knowledge that assets in the hands of a going banking concern are regarded very differently from the same assets, upon the bank going into forced liquidation. The change of circumstances is quite likely to depreciate the value of the securities to a very marked degree.

The learned trial court charged the jury, over and over again, that whether the bank was insolvent on the particular days material to the case, turned on whether it had sufficient assets to meet its liabilities in the ordinary course of business,

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and whether the accused at such time had good reason to know the bank was unsafe or insolvent, was whether he had such reason to know it did not possess sufficient assets to pay all its liabilities as they matured and became payable in the ordinary course of business. On the other hand the learned court refused to instruct the jury that the statutory test was whether the fair value of the assets on the particular days named was sufficient to cover the liabilities, exclusive of liabilities to stockholders.

In view of the situation that, according to the undisputed proof, there was an excess of assets over liabilities, within the rule requested to be given to the jury, the error in refusing such request, if there were error in that regard, was prejudicial in the highest degree, since such request, in view of the evidence, was, in effect, one to render a verdict in favor of the accused.

There is no question but that insolvency, as the subject is dealt with under the insolvent and bankrupt laws, regarding a condition where, by the theory of such laws, the person or concern should suspend and take such measures or submit to such, for the protection of creditors, as to insure equality of treatment, is as the court instructed the jury. That is the limited, not the common, popular, or general meaning of the term. The latter suggests, merely, a substantial deficiency of assets to cover liabilities. In a multitude of authorities involving administration of bankrupt and insolvent laws and situations properly classible therewith, authorities mainly relied upon by the prosecution, insolvency is viewed in the limited sense, while the general sense is universally conceded to be as indicated. So it will be seen that a bank may be insolvent in the limited sense and clearly not in the broad general sense.

Must the limited meaning be given to the term "unsafe or insolvent" as used in the statute? Is it true that, under all circumstances, the proprietors of a bank, though believing

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they have an abundance of assets to pay out within a reasonable time all liabilities to depositors, must close the doors and go into liquidation whenever they have good reason to know they will, or probably may, not be able to pay all demands upon the bank in the usual course of business, and that every moment of time they keep open for business thereafter they are criminals before the law and liable to be prosecuted and punished by long terms of confinement in the state prison? If such is the law, the banking business is exceedingly unattractive and the more conscientious the banker is, the less attractive it is.

It must be seen, at once, that the statute is open to construction. The words used have the two well known and widely different meanings. By the familiar rule that, in general, the common, ordinary meaning of words in a law is to be taken as the one intended by the legislature, we must discover some efficient reason for holding that it did not have in mind, in enacting the law in question, the one which the learned trial court rejected.

While it is reasoned by some courts that the mischiefs to be guarded against by such legislation suggest the limited meaning as intended, such reasoning is not satisfactory and is not in accord with the reasoning of other just as respectable courts holding to the contrary view.

There is no more legitimate business than that of banking. There are laws for the promotion of it, beneficial to those engaged therein and their patrons, in every civilized nation on earth. Our laws contemplate that all but a small proportion of the deposits in a state bank and all of its capital stock may be loaned for considerable periods of time and quite a proportion on real-estate security. It is permitted to put twenty-five per cent. of its capital and surplus into banking house and fixtures. It is permitted to loan fifty per cent. of capital, surplus and deposits upon real-estate security, and without limit in this and adjoining states when authorized by a resolution

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of two thirds of the board of directors. There is a legal limit upon the amount that may be loaned directly to one person, but there is no limit whatever as to indirect loans, and no limit as to loaning on approved security to a single borrower, short of the whole capital stock and surplus, in case of two thirds of the directors consenting thereto by a duly recorded vote. There is no limit as to time upon which loans may be made. Notwithstanding this broad discretion the law only requires a reserve on hand in cash, either in bank or available in correspondent reserve banks, of fifteen per cent. of the deposits.

In the situation indicated, would it be reasonable to suppose that a bank must, at all events, be prepared to pay every one who calls his credit in the usual course of business under peril of the severe punishment provided in sec. 4541, Stats. (1898)? Must persons engaged in such business, while not going outside the permitted methods with bad intent, upon every occasion of their competency to pay in the usual course of business being challenged, regardless of competency to pay ultimately, be conscious of drifting within the shades of prison walls; into realms of everlasting disgrace for themselves and their families? The very picture, not at all overdrawn it is thought, suggests, most forcibly, that such a meaning as the learned trial court attributed to the statute would lead to the most absurd results. That of itself would require rejection of such meaning, there being another perfectly reasonable, and a fairly, at least, appropriate one.

The reason for not adopting the drastic meaning attributed to the statute by the trial judge, suggested from the viewpoint of the banker, is reinforced by one quite as persuasive from the point of view of patrons of a bank. It is a matter of common knowledge that liquidation of a bank in insolvency proceedings is inevitably attended with great losses which commonly fall on the depositors. So when a banker stands face to face with a condition of probable inability, merely to pay

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all liabilities "in the ordinary course of business," he knows that to go into liquidation, unless that is absolutely necessary, is inviting disaster for the depositor often in far greater measure than to persist in going on. Premature suspension or unnecessary suspension often is the very worst thing that could happen to the persons the statute is designed to protect. In that situation, if the statute were construed as the counsel for defendant in error contend it should be, the fabled position of most unfortunate danger would be quite real, the banker while bending all his energies to perform his duty of avoiding danger on the one side would be quite likely to fall into a still greater danger on the other. Avoiding Scylla, he would fall into Charybdis.

Looking to our own decisions we find that the precise question under discussion has not been heretofore treated. Our attention is called to *Baker v. State,* 54 Wis. 368; 12 N. W. 12; *In re Koetting,* 90 Wis. 166, 62 N. W. 622; *State v. Shove,* 96 Wis. 1, 70 N. W. 312, but in neither is the question discussed or helpfully alluded to, much less decided. The same condition exists in most all the adjudications elsewhere under similar statutes. The secret of that, doubtless, is that only in rare instances has there been a prosecution of this sort unless the bank was so hopelessly insolvent that its condition in that regard satisfied every meaning of the term insolvency, beyond question.

In *State v. Cadwell,* 79 Iowa, 432, 44 N. W. 700, the bankruptcy rule was adopted, citing in support thereof wholly civil cases where such rule is appropriate. The reasoning in the opinion does not appeal favorably to our understanding. It is wholly from a one-sided point of view. The bank there was insolvent under any rule and unquestionably so. Reference is made to a federal case, without stating where it may be found, but it is sufficiently identified to point, unmistakably, to *Dodge v. Mastin,* 17 Fed. 660. Turning thereto we find it held that a bank may be insolvent in the limited sense

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the term is used in bankruptcy matters; it may even be forced to close its doors for want of money to pay all calls upon it in the ordinary course of business,—and yet not be insolvent within the meaning of the criminal law. It was said:

"A bank is solvent, within the meaning of the constitution and the statutes we are considering, when it possesses sufficient of assets to pay within a reasonable time all its liabilities through its own agencies."

The Iowa case has been cited with a measure of approval in some instances, but not in any one of consequence of this sort, so far as we are able to discover. It must be conceded it has some support in *State v. Beach,* 147 Ind. 74, 43 N. E. 949, 46 N. E. 145; *Queenan v. Palmer,* 117 Ill. 619, 7 N. E. 470, 613; *Meadowcroft v. People,* 163 Ill. 56, 45 N. E. 303; *State v. Myers,* 54 Kan. 206, 38 Pac. 296. In a pretty full review of authorities in an article in 37 Cent. Law J. 147, it is condemned, authorities being cited and logic used to the conclusion that a bank is not unsafe or insolvent, in the language of the criminal law, if its property is worth more than all its liabilities, even though it be in such condition, at the time of receiving a deposit, that it has to default soon on maturing liabilities. We should remark, in passing, that the author took note of the fact that in the Iowa case the bank was hopelessly insolvent within any meaning of the term, so the court did not need to go to the extent it did. For that reason, we may well apprehend, the question did not receive the attention, at the hands of the court, it otherwise would.

We will close this opinion without any extensive review of authorities. We venture to say that, in all situations except in respect to the administration of bankruptcy and insolvency laws, the term under consideration is regarded as contemplating insufficiency of assets, in money value, to balance liabilities, such money value to be realized, not by a forced and in-

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voluntary sale, but by handling in the ordinary way an ordinarily prudent man would generally conduct his business under the same or similar circumstances.

The following are examples of the application of the rule we have stated: *Hamilton v. Menominee Falls Q. Co.* 106 Wis. 352, 81 N. W. 876; *Marvin v. Anderson,* 111 Wis. 387, 87 N. W. 226; *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *Livingston v. Bank of New York,* 26 Barb. 304, 308; *Walkenshaw v. Perzel,* 32 How. Pr. 233. The position of this court on the general question is well summarized in the syllabus to *Hamilton v. Menominee Falls Q. Co., supra,* thus:

"Insolvency, in such connection, does not mean an insufficiency of quick assets to pay all debts at once, nor inability to meet commercial obligations as they fall due in the course of business, but that the property of the corporation, real and personal, estimated at a fair and reasonable valuation, is substantially less than its debts."

There is a peculiarity in our statute, perhaps distinguishing it from the Iowa statute and certainly from those of Indiana, Kansas, Illinois, and many other states. The word "insolvent" only is used in most statutes, while that, in connection with the word "unsafe," is used in ours. Not in the disjunctive, as said in *In re Koetting,* 90 Wis. 166, 62 N. W. 622, to suggest separate conditions forming bases for the criminal liability, but as "legal equivalents," the latter word to explain and emphasize the first. That fairly indicates that the legislative idea was something more than insolvency in the limited sense.

An examination of the statutes of other states fails to disclose any similar use of words in a similar statute, except in Minnesota. Ch. 219, Laws of Minn. 1895. The supreme court of that state in *State v. Clements,* 82 Minn. 434, 85 N. W. 229, in defining the term, rejected the idea of competency to pay liabilities "in the ordinary course of business," adopt-

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ing this, by way of approval of the trial court's instruction on the subject:

"If the assets of a banking firm and of the individual members thereof are insufficient in value to pay the debts of such firm, then such firm is insolvent. A bank or banking firm is solvent, within the meaning of the statute, when it and its several members possess assets of sufficient value to pay, within a reasonable time, all its liabilities through its own agencies, and is insolvent when it and its individual members do not possess assets of such value."

We approve of that, substantially, preferring, however, to express it in this way: The term "unsafe or insolvent" in sec. 4541, Stats. (1898), has regard to deficiency of assets, realizable in cash value within a reasonable time, treating them as an ordinarily prudent person would ordinarily conduct his business, to cover liabilities exclusive of stock liabilities. A bank is insolvent when the fair cash value of its assets, realizable within a reasonable time, in case of liquidation by the proprietors, as ordinarily prudent persons would ordinarily close up their business, is equivalent to its liabilities, exclusive of stock liability.

That gives a sensible construction to the statute, treating the banking business with the consideration it deserves both from the standpoint of patrons and patronized, instead of treating those engaged therein, and responsible for the safety of the cash and idle capital of the country, and responsible for the correctness of the innumerable exchange transactions of business in every-day life, as if they were a dangerous class, to be fenced about as classes generally are, of criminal tendencies. It provides punishment for the really bad and without crushing the merely unfortunate, and subjecting all, or a large proportion, in perilous financial periods, to worriment of unreasonable menace.

A point made that the law under which the grand jury was drawn which found the indictment is unconstitutional, be-

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cause it denies to an accused person the equal protection of the laws and due process of law, is ruled in favor of the defendant in error by *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475; *Vought v. State,* 135 Wis. 6, 114 N. W. 518, 646.

There is no other question which needs discussion or even mention. The judgment must be reversed. Whether the cause should be remanded with directions to discharge the accused upon the ground that he should have been discharged on the case and motion made therefor below, is not free from difficulty. That such course would be the right administration, in a clear case of uselessness of a new trial, within the contemplation of the Code which on reversal requires the cause to be remanded for a new trial, only when necessary; that is, only when justice, in the judgment of this court, does, or seemingly may, demand it (sec. 3071, Stats. 1898), has been vindicated,—many times in recent years. *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800; *Hay v. Baraboo,* 127 Wis. 1, 105 N. W. 654; *Miller v. State,* 139 Wis. 57, 119 N. W. 850.

When it is clear that a full trial has been had and that a new trial would not be liable to change the situation, assuming that the witnesses who testified cannot honestly do more than repeat their testimony, public and private interests as well demand that, upon a reversal here, such disposition should be made of the matter as to terminate the litigation.

Because of the probability, amounting to almost reasonable certainty, in view of the verdict on the third charge, that under proper instructions there would have been a full acquittal, and other circumstances in the case—a demand for a new trial, from the standpoint of public justice, is not very clear. However, since the case was tried on quite an untenable theory, it is the opinion of the court that it should be remanded for a new trial, which will not preclude the prosecuting at-

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torney, if he shall deem best, from dismissing the cause with consent of the trial court.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

BARNES, J., took no part.

STATE EX REL. BASHFORD vs. FREAR, Secretary of State.

February 23—March 9, 1909.

Supreme court: Justices: Term of office: Appointment to fill vacancy: Change in compensation: Constitutional law: Practical construction.

1. Art. VII of the constitution creates the office of justice of the supreme court, fixes the term of office, and provides for filling the same, and such term is a unit, including, so far as such article is concerned, periods within the full term of incumbency by appointment or election to fill a vacancy.
2. Generally speaking, a constitutional prohibition as to increase or decrease of the salary incident of an office during a term thereof, whether in the form of a prohibition of such a change during the term for which an officer is elected or during an officer's term of office, refers to the full term, fixed by the fundamental or other law.
3. In the situation last mentioned, generally speaking, a person appointed to a vacancy or elected thereto, does not have a term of office, in the constitutional sense, but takes a part of the unit, to wit, of the full term. He merely steps into the place and term of his predecessor and becomes subject to the incident of that term, the salary.
4. Whether "his term of office" in sec. 26, art. IV, of the constitution of the state of Wisconsin is synonymous with his incumbency of the office under a particular election or appointment, or is synonymous with the full term of the office created by art. VII, is not so free from doubt as not to be open to solution by judicial construction.
5. The language "his term of office" in the constitutional provision creating legislative disability to change the compensation of public officers under some circumstances, is ambiguous.

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6. The language may, as an original proposition, be regarded as treating with the term of office created by art. VII or any particular incumbency, whether of a full term or part of a term.
7. In case of an ambiguous law being executed by administrative officers as having a particular meaning which is reasonable, such practical construction is entitled to more or less weight, according to circumstances, in determining the intent of the awmakers.
8. In case of such practical construction obtaining uninterruptedly for a very long period, particularly so long as fifty years, it is entitled to controlling weight in determining the intent of the awmakers.

[Syllabus by MARSHALL, J.]

TIMLIN, J., concurring, is of the opinion that sec. 26, art. IV, Const., relates to the *officer*, not to the *office*, and to *his* term, not to *the* term; and that the true interpretation of the section is that he who comes into an office lawfully by election or appointment to fill a vacancy caused by the death, disability, resignation, or removal of a different prior incumbent is not under the restrictions as to increase or diminution of salary which bound the prior incumbent, but takes under the law in force at the time of his appointment or election to fill the vacancy.

APPLICATION for a writ of *mandamus* to compel the secretary of state to issue his warrant to the state treasurer in favor of the relator, Hon. *R. M. Bashford,* for $500 as balance of his salary as justice of the supreme court for the period from January 1, 1908, to July 1, 1908. *Granted.*

Hon. JOHN B. CASSODAY, pursuant to election and qualification, entered upon a full term of ten years as justice of this court on the first Monday of January, 1900. The salary fixed by law for a justice of such court was $5,000 per year, payable quarterly in advance. The office became vacant by his death, prior to January 4, 1908. In the meantime the salary was increased to $6,000, payable as before. On such date Hon. *R. M. Bashford* was duly appointed to fill the office made vacant as aforesaid, such appointment pursuant to sec. 9, art. VII, of the state constitution, to continue until the election and qualification of a successor of the deceased jus-

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tice. A successor so elected and qualified duly assumed the duties of the office July 1, 1908. In the meantime the secretary of state issued warrants to said *Bashford* aggregating $2,500, being the amount the deceased justice would have been entitled to had he lived and continued his incumbency, refusing to issue warrants to said *Bashford* for a half year's salary at the rate of $6,000 per year, which he claimed was his due. He accepted the warrants without prejudice to his right to the additional $500. The secretary refused to recognize such claim upon the ground that the prohibition contained in sec. 26, art. IV, of the state constitution as regards any increase of a state officer's salary "during his term of office" relates to the full term created by the constitution, or other written law, and not the particular part thereof during which it may be filled by an incumbent, but covers all parts as a unit, and that sec. 1, ch. 414, Laws of 1901, whereby the salary incident was changed to $6,000 with a provision that it should not apply to the remainder of the terms of justices then in office, had reference to the regular terms of office, not to particular persons filling the offices for particular periods.

Upon a motion by the defendant to quash the alternative writ there was a brief for the petitioner signed by *John A. Aylward* and *R. M. Bashford in pro. per.*, and briefs for the defendant by the *Attorney General* and *Russell Jackson*, deputy attorney general.

MARSHALL, J. This application presents a very interesting and somewhat grave question. In all, or most, written constitutions, provision is made against changing an officer's salary during his term of office.

The temptation, which competency of the legislature to change salaries of officers during terms of office would hold out for it to do so, for bad as well as for worthy purposes, and for executives to manipulate such a situation to serve either purpose, or to favor one officer above another, or officers to

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scheme for their own pecuniary aggrandizement,—has been supposed to be so fraught with danger, interfering with that high standard of official life requisite to the best public service, that in the fundamental laws, generally, absolute disability of the lawmaking power to change the status of the salary of an officer after the commencement of the term for which he was elected, as it is sometimes phrased, or during his term of office, as it is likewise phrased, is found.

The general trend of authority is this way. The constitution or other written law creates the office and fixes the term thereof and gives thereto the incident of a specific salary. The office, the term, and the incident may exist for any period of time without the office being filled or without there being any method provided for filling it. Upon such method being provided and the office being filled the incumbent takes it with its fixed term and incident. If he goes out during such term and another steps in the latter does not take a new term but takes a part of the same term prior thereto enjoyed by his predecessor. The term continues during its fixed period with its incident for such period regardless of how many incumbents there may be, each succeeding the other. Where another incumbent goes in at the commencement of the full term prescribed by law, such full term becomes his term, within the meaning of language in the fundamental law prohibiting any change in an officer's salary during his term of office, and in case of his going out during such term and being succeeded by another such other succeeds to the same term as that held by his predecessor, so that, during his incumbency, the full term, so far as not yet run, becomes his term in the constitutional sense.

That has been supposed by courts which have dealt with the matter to be the proper construction to be placed upon a constitutional provision similar to ours, in view of the logic of the situation, regardless of whether the language of the constitution prohibits a change of salary of an officer "dur-

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ing his term of office" (*Larew v. Newman,* 81 Cal. 588, 23 Pac. 227; *Storke v. Goux,* 129 Cal. 526, 62 Pac. 68); or "during the term for which he was elected" (*Harrison v. Colgan,* 148 Cal. 69, 82 Pac. 674); or "the time for which he was elected" (*Gaines v. Horrigan,* 4 Lea (72 Tenn.) 608).

Those decisions cited by counsel, as well as *People ex rel. Bentley v. Le Fevre,* 21 Colo. 218, 229, 40 Pac. 882; *Simpson v. Willard,* 14 S. C. 191; *Jameson v. Hudson,* 82 Va. 279; *State ex rel. v. Schmidt,* 14 Mo. App. 589, being all the cases of moment on either side, except one hereafter noticed, are to the effect that the term of office fixed by law, in the absence of some clear indication to the contrary, is a unit; that the incident thereto is as unvariable as the term, and that one who comes in to fill a vacancy does not take a new term but merely takes up the work of the old term with its duties and its incidents. The industry of counsel has resulted in placing before us all the authorities extant, bearing helpfully on the question. None of them go back within many years of the time when the administrative officers of this state, without judicial guidance, took a stand in regard to the matter.

The petitioner cites *Barnum v. Gilman,* 27 Minn. 466, 8 N. W. 375, as holding contrary to the foregoing, and that the words "term of office for which he is elected" in the Minnesota constitutional prohibition against a senator or representative holding any office under the authority of the United States or the state, with certain exceptions, "during the term for which he was elected," mean during the term of his incumbency; that the term for which he was elected is synonymous with "his term of office," which means during his incumbency of the office; that during one full term of office there may be several successive incumbents, each having a fraction of a full term, and in that situation have a term of office which as to him is his term of office.

That logic is diametrically opposed to the other cases cited and would go far to sustain the petitioner's petition, if the

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court which adopted it had adhered to its decision. It had the support of a long line of opinions of the state's highest legal adviser, but when the court came to face the situation created by such decision, reinforced by such legal opinions, fifteen years later, it overruled it, adopting, without qualification, the same logic and arriving at the same conclusion as courts had before and have since, to which we have referred.

In view of the result reached, it is useless to spend further time in the discussion of authorities. So much as has been said seemed to be required to show that the authorities, upon which the learned attorney general and the petitioner rely, have not been overlooked or misunderstood. It seemed to be especially due to the attorney general and the secretary of state, as a vindication from any suspicion of capricious obstruction of the petitioner's efforts to obtain from the state treasury what he conscientiously believed to be his due.

In view of the trend of authority as we have fairly, it is thought, indicated it to be, they may well have had very serious doubts as to whether the petitioner's claim was valid, and, having such doubts, they exhibited a most commendable fidelity to their high official duty to guard the public funds by resolving that doubt in favor of the state and leaving the result to be dealt with by this court. If the result shall be that such doubt, under all the circumstances, in the judgment of this court, should be resolved in favor of the petitioner, it will not take even a jot from their credit in the matter.

Our constitution at sec. 1 [4], art. VII, creates the office of justice of the supreme court and the term of office. It left the legislature, as the instrumentality to attach thereto the salary incident, entirely untrammeled, except by sec. 10, art. VII, commanding that each of the incumbents "shall receive a salary, payable quarterly, of not less than one thousand five hundred dollars annually," and no other compensation whatever. The same section deals with the term of office created by the previous section referred to by providing that an incum-

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bent "shall hold no office of public trust, except a judicial office, during the term for which he is elected" and all votes cast for him by the people or the legislature during such period except as aforesaid "shall be void." Here we have the office, the term of office, the incident of office, to wit, the salary and the exclusion from every field of official life outside of the judicial field during such term, to wit, the elective term. All that, is in the article especially devoted to the judiciary.

Turning now to art. IV, devoted to the legislature and its powers, we find that it creates an absolute disability of the lawmaking body to change, in any way, either by increasing or decreasing, any public officer's compensation "during his term of office." There is no prohibition in those parts of the constitution dealing with the different classes of state officials or their terms of office on the subject of increase or decrease of compensation, as in the other states to which we have referred. For instance, in California the prohibition, as to municipal officers, is in that part of the constitution relating to the offices. The same is true with reference to county officers and likewise with reference to judges of the courts and so with reference to offices commonly denominated state offices: governor, secretary of state, state treasurer, and the like. There is nothing on the subject in the chapter relating to legislative powers. The same is true in Tennessee.

We mention the last foregoing for what it is worth. It is not entirely without significance on the subject of whether the words, "his term of office," in the clause relating to legislative powers, means term of office created, as indicated in the article on the judiciary, or "during the term for which they are respectively elected," in sec. 10 of the same article. If the section which relates to the salary contained a prohibition as to increase or decrease, as in other state constitutions, there would be less difficulty in reaching a conclusion. As it is, the question presented is somewhat new. Its solution rests on the limitation of legislative power, disassociated entirely from

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the provision as to the office, term of office, and salary where the term doubtless is disassociated from the incumbent.

Sec. 9 of art. VII, relating to filling vacancies in the office of justice of this court, is closely associated with the other features of art. VII and doubtless speaks of term of office in the same sense as such features. It provides that in case of vacancy it shall be filled by appointment by the governor, which shall continue until a successor is elected and qualified, and such successor shall hold his office the residue of the unexpired term, thus recognizing the unity of the term, part lasting during the incumbency of the person taking the office by election at the start, part during the incumbency of the appointee, and part, "the residue of the unexpired term," during the incumbency of the second person elected.

It seems quite singular, if the plan of the constitution makers were to apply the idea of unity to the salary, coinciding with unity of term under art. VII, that a prohibition as to change in the salary incident to the office being made during a pending term, was not incorporated in sec. 10, the appropriate place as an original matter and according to constitutions generally then existing and constitutions since framed for other states. The constitution of Michigan was used as one of the models worthy to be followed. The particular feature under discussion was incorporated therein at the point where one would expect to find it, if the salary for the full term was intended to correspond thereto as to unity. Why was it dropped out by the framers of our constitution, they contenting themselves with placing a limitation upon legislative power, in the article on that subject, to change the "compensation of any public officer during his term of office," using language, as will be seen, quite appropriate to the idea that the particular time of the particular officer's incumbency of the office should be regarded, at that point, as "his term of office" instead of the full term dealt with from first to last in art. VII?

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Now at this late day, for the first time, the court is challenged for a judicial answer to the question of whether the peculiarity above mentioned, efficiently, evinces a purpose to deal with a mere period of incumbency in art. IV while plainly dealing with the office, and term of office, as a unity, disassociated from the personal element, in art. VII. It is somewhat unfortunate that it has been so left; that after the lapse of more than half a century, during which many of the honored members of this court were compensated for their services upon the theory that the term mentioned in art. VII is not, necessarily, that mentioned in art. IV, and in excess of what they would otherwise have received, and after most of the justices, so affected, are only with us in memory, in history and the records,—we must take up the question of whether they were rightly so compensated or not. We approach the question, notwithstanding such situation, entirely unconscious of bias, one way or the other, hoping to decide the same upon the high plane of judicial impartiality.

If we had to deal with the matter from the standpoint of 1857, or thereabouts, we might not be able to discover, satisfactorily, that a prohibition, such as is found in other constitutions, associated with the creation of the office and of the term of office and providing for its incident of salary, bore primarily on the competency of the officer to take an increased salary, more clearly than on the competency of the lawmaking power to provide for it; or that, whether the prohibition be so located or as we find it in art. IV of our constitution, it would not be a limitation of legislative power, primarily.

If it were not for the conditions hereafter noted it would be very difficult to escape from the logic of the decisions elsewhere to which we have referred. Except for the peculiarity mentioned the situations harmonize in opposition to the petition.

From what has been said, it is quite clear that the meaning

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of "his term of office" in art. IV of the constitution is far from being free from ambiguity. Even if it were used in an appropriate section in art. VII, dealing with the office of justice of this court, the term of office, and the compensation, it would still be, as an original matter, far from being free from obscurity. That is well illustrated by the decisions of the different courts which have defined it, only by resort to rules for judicial construction. It will be seen by an examination of the decisions to which we have specially referred that in every one of them the term under discussion, or some similar term, was treated as involving obscurity of meaning. So far as the uncertainty in the present case exists, by reason of the location of the vital words in art. IV instead of in art. VII, obscurity is lessened in favor of the petitioner. If one could entirely shut his eyes to the features of art. VII to which we have alluded, the words "compensation of any public officer during his term of office" might be held to unambiguously refer to the period of incumbency as the term of office of the incumbent. If there was a shadow of ambiguity, it might be dispelled by the light of the conditions the constitution makers were dealing with. There was a young but rapidly growing community. Offices, and terms of office of considerable length, had been provided for, or were in contemplation, with salary incidents so very meager that it could not have been thought, in some cases, the grade of service appropriate to the situations could be secured beyond a brief pioneer period. That is strikingly illustrated by the fact that the salary of a justice of this court was, at first, only $1,500, while the term of office was fixed at six years.

When it is conceded, as it must be, on the most favorable view for respondent, that the situation involves uncertainty, it admits that practical construction, so far as the same has been given to the matter, is entitled to considerable weight, especially since it has covered a period of over fifty years without interruption, as we shall see. So we will review the situation

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in that regard, not stopping to discuss the competency of practical construction of a law, in aid of discovering the intent thereof, where such intent is involved in obscurity. The law in that regard is elementary.

By ch. 102, Laws of 1857, the salary of a justice of this court or a circuit judge was increased from $1,500 to $2,500, payable quarterly, in the manner then payable, the same to apply to any justice thereafter elected or appointed, but not to be construed so as to increase the compensation of any circuit judge then in office "during his term of office." It will be interesting to note that the only subject mentioned in the title of the act is, salaries of the judges of the circuit courts, and that the declaration against construction so as to enhance the compensation of officers in service during their terms did not apply to justices of the supreme court. That suggests legislative intention, so far as competency existed, to increase the compensatory incidents of such offices as to incumbents coming in after the passage of the act by appointment or election to fill out a pending term under art. VII of the constitution. That is, that the legislature had in mind the idea that the term of office in such article was something different from the term of office of any public officer under sec. 26, art. IV. Without such idea no reason could well be assigned for the legislative purpose indicated.

Under the law aforesaid, till the decision in *State ex rel. Crawford v. Hastings,* 10 Wis. 525, made in the early part of 1860, there was some uncertainty, after the passage of ch. 41, Laws of 1854, seemingly, changing the time for the commencement of the term of office of a justice of this court from June 1st after the election till the first Monday of January after such election, as regards whether such change was effected or not. Justice COLE and Chief Justice DIXON at the outset concluded that such change was effected, while later the chief justice joined with Justice PAINE in a contrary decision. During the period of uncertainty Chief Justice

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WHITON was re-elected, and evidently supposed that the term for which he was first elected, which by the law then in force continued till May 31, 1857, or until his successor was elected and qualified, covered the interim between that date and the commencement of the new term under the change in the statutes, but that such interim period might be a new term under sec. 26, art. IV, instead of a part of the whole term. If "term" under art. VII of the constitution was identical with "term" mentioned in art. IV, then the salary incident might be governed by the law prior to the passage of the act of 1857. If the appointment was for a new term intervening between the termination of the old and the commencement of the new one; if the interim was to be considered as a period to which he was appointed by force of law, then it might be that the increased compensation provided by the act of 1857 applied to it, and it might be that such situation was the very thing the legislature had in mind in the peculiarity of the legislation before mentioned. Let that be as it may, as the record shows, the chief justice took advice of his associates in service, Justices COLE and SMITH. All concurring, they advised, unofficially, the secretary of state. Thereupon, and perhaps, as is most probable, upon advice of the attorney general, he ruled that while the interim period was, in one sense, a part of a term added, by force of law, it was a separate period or term of office as regards sec. 26, art. IV, which the legislature probably had in contemplation, and accordingly a warrant was issued to him for the increased pay provided by the act of 1857.

Later Justice PAINE was elected to succeed Justice SMITH, whose term of office, according to the law as it existed at the time of his election, expired May 31, 1859, while the new election was for a term commencing, as was supposed by some, January 1, 1860, and by others as not so commencing, Justice PAINE being of the latter view. With that uncertainty existing it was solved by Justice SMITH resigning and Justice

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PAINE being appointed to the place to serve until the succeeding January 1st by such appointment, and its being so arranged that he would fit into the place regardless of the outcome of the mooted question. For this appointive period the secretary of state, as state auditing officer, ruled that the salary incident was regulated by the act of 1857, and issued to Justice PAINE salary warrants for the period commencing June 1, 1859, and ending January 1, 1860, so as to comply with the law whether such period were considered a term of office within the meaning of sec. 26 aforesaid, or part of a full term commencing June 1st aforesaid under art. VII of the constitution.

By ch. 33, Laws of 1867, the salary incident to the office of justice of this court was again changed from $2,500 to $3,500 and to apply to justices "hereafter elected or appointed." The act took effect March 26, 1867. Public desire to retain the valuable services of Chief Justice DIXON, whose term was drawing to a close, doubtless influenced this legislation. The history of the times so tells us. The election was to come, regularly, in April, 1869, leaving quite a period with the salary incident at the low point. It was supposed by the governor, the chief justice, and, evidently, his associates, Justices COLE and PAINE, that in case of his resignation and reappointment to fill out the pending term as an appointee, he would have a new incumbency under sec. 26, art. IV, aforesaid and be within the letter of the salary increase act. Such, as we have seen, had been the prevailing idea for now over ten years. That course was taken for the manifest purpose—which all parties concerned, directly or indirectly, the governor, the attorney general, all the justices of this court as individuals, the state treasurer, and the secretary of state, who necessarily ruled on the question in issuing the warrant which the chief justice received—of affording him the salary increase designed, which was supposed to be necessary in order to retain his services, and which was universally thought he might rightfully receive.

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After the increase of salary by the law of 1867, Justice DOWNER, who succeeded Justice PAINE upon his retirement in 1864 to enter the army, resigned and was succeeded, September 11, 1867, by return of Justice PAINE, by gubernatorial appointment, to fill the place till it could be filled by election the succeeding spring. In due time it was so filled by election of Justice PAINE. In the meantime, by ch. 145, Laws of 1868, the salary was changed from $3,500 to $4,000, to apply, as before, to justices thereafter elected or appointed. In January, 1871, Justice PAINE died and Judge WILLIAM P. LYON, by appointment, succeeded to fill the vacancy till it could be provided for by election the succeeding spring, which was done, Justice LYON being elected, and at the same time being chosen for a full term. Here then we have four separate periods of incumbency during the term for which Justice DOWNER was elected and as to which period, respecting his term of office under art. VII aforesaid, the salary incident was $2,500 per year. For two of the periods the office was filled by Justice PAINE, as we have seen, one by appointment and one by election, while the other two were filled by Justice LYON. Each incumbency was regarded, as to the incumbent, as his term of office under sec. 26 aforesaid, Justice PAINE receiving the increase of salary over that received by Justice DOWNER of $1,000 for the first period and $1,500 for the second period, and Justice LYON the latter increase for each of his periods. Justice PAINE'S first period, as will be observed, preceded the transaction as to Chief Justice DIXON before mentioned, and was regarded as a safe precedent therefor, in view of previous history, as will be hereafter seen. Justice PAINE'S second period and Justice LYON'S two followed the agitation created by the transaction as to the chief justice and was doubtless supposed to be justified, without room for serious controversy, by the result of such agitation.

We may well say, in passing, that in the official record as promulgated by the secretary of state, from time to time, in the blue book, both as to all the periods we have mentioned

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and that of RYAN, Chief Justice, hereafter alluded to, the salaries of justices of the supreme court are specified, in harmony with the construction of the fundamental law, by those who had to do with the matter, as indicated.

The action of Chief Justice DIXON challenged public attention, sharply, to the manner the constitutional provisions under discussion had been construed and administered. Some claimed they had been violated. Such is the history of the times. The next spring after the particular occurrence it was necessary to fill the place temporarily occupied by the appointee, by an election. Chief Justice DIXON was a candidate for the vacancy he had created. Hon. Charles Dunn was an opposing candidate, the issue largely, if not in the main, being whether the occurrence aforesaid was proper.

In the situation stated, the position of the chief justice and his associates and all others who had been previously concerned in administering the ambiguous law, was placed before the people of the state in a carefully prepared article, published in the official state paper under date of January 16, 1868. By whose hand it was prepared we have no way of knowing, except as we may judge by the manner the subject was treated. That the article was written with consummate care and the situation stated with the legal precision which would be expected of a trained judicial mind, is quite evident. That it, at least, received the approval of the chief justice and his associates, there can be little or no doubt. Here is so much of the presentation as is particularly appropriate to the full history we are endeavoring to write, and appropriate as a vindication of the chief justice from any criticism upon his course from the standpoint of common judgment in 1868:

"The provision of the constitution which is claimed to have been violated, is found in art. IV, sec. 26, and is as follows: 'Nor shall the compensation of any public officer be increased or diminished during his term of office.' What was the meaning and intention of this provision? Did it have reference to

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the full term of office only? This is not claimed by any one. Thus it is conceded that Judge PAINE, who was appointed in the place of Judge DOWNER, who had resigned, is entitled to the increased salary. This is for the reason that his 'term of office' did not commence until his appointment took effect. It was, therefore, a distinct, independent term of office and not identical with the term of Judge DOWNER, who had resigned.

"The term of office which Judge PAINE holds by appointment will continue until his successor is elected and qualified. And then his successor will enter upon another term of office, which will be his term. And if, before such election, the salary should be again changed, and either increased or diminished, no one will doubt that such successor should be paid according to the new law, whether more or less than the present salary.

"This is because there will be three distinct terms of office, all occurring within the full term, or period of time for which Judge DOWNER was elected. First, his term, which expired when his resignation took effect. Second, the term of Judge PAINE, which began at his appointment and will end when his successor is elected and qualified. And third, the term of his successor, who is to be elected next spring.

"Now it being conceded, as it is universally, that these constitute three distinct terms of office, within the meaning of the constitutional provision under consideration, all ground of objection to the action of Judge DIXON fails. Because the constitution did not prohibit an increase or diminution of the salary at any time during the full term for which he was elected. On the contrary, it only prohibited it as to him during the term for which he should hold by virtue of that election. But it was in his power to put an end to that term at any time. And who can say that he had not a perfect right to do so? He violated neither the letter nor the spirit of the constitution in giving up his office. He submitted himself again to the appointing power, and will be obliged to submit himself again to the people if he is re-elected. The governor was not obliged to reappoint him. If there had been any valid objection against it—any fitter person to fill the office—the governor might have appointed any other citizen as well, and we are bound to suppose that, in this case, as in any other, he made the appointment because he considered it the best, and in view of the responsibility that rested upon him. But as he

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did reappoint him, Judge DIXON took the office by a new tenure and entered upon a new term, precisely as any other person would have done. It was, therefore, with him a mere question of financial expediency—it might be said, with truth, of financial necessity. It was a question of whether he would continue to hold the office by virtue of his election, at the old salary, or give it up and take his chance for a reappointment and re-election for the sake of getting the increased salary. The reasons which compelled and fully justified his course are notorious. The war had doubled the expense of living, so that the old salary was inadequate to the support of his family. He had spent a number of the best years of his life in hard, unremitting toil, for this inadequate compensation, and having exhausted the little surplus which he had previously acquired it was a matter of sheer necessity with him either to give up the office altogether, or to take it by a new tenure under which he would receive the increased pay. Of his right to do this there is no question. That it was, under the circumstances, a duty which he owed to himself and his family, is clear. Of course the people are not obliged to re-elect him. That was one of the chances which he took, and had a right to take. But to refuse to re-elect him upon this ground would furnish a signal illustration of that affected virtue which strains at a gnat but can swallow a camel."

Thus the matter was put to the people, followed by such discussions, as would naturally be expected, up to the day of election, resulting in election of the chief justice by a substantial majority. That set the matter at rest for a long time, and, as was supposed, probably, permanently, as indicated by the fact that the chief justice was re-elected the following spring for a full term of six years without opposition and as further indicated by subsequent history, as we shall see. To what extent the foregoing really vindicates, as right, the circumstance of the resignation from office and regaining thereof, in the manner indicated, for the manifest purpose of thereby obtaining a greater compensation for official services than that incident to the office at the start, we do not intend to express any opinion.

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By ch. 293, Laws of 1873, the salary was raised to $5,000, payable, as before, to justices "hereafter elected or appointed." January 1, 1874, Chief Justice DIXON, whose term was to expire by law the 31st day of May, 1875, resigned, leaving a residue of the term for which he was elected of some over one year. Hon. EDWARD G. RYAN took the place, by appointment, till elected in the spring of 1875 to fill out the residue of the term. Such election and appointment were, in harmony with previous history and within the letter and intent of the act of 1873, for an incumbency, first by appointment and, subsequently, by election: two separate terms of office, within the meaning of sec. 26, art. IV, of the constitution, as the same had been theretofore understood, though parts of one entire term, contemplated by art. VII. Accordingly Chief Justice RYAN was compensated for his services according to the act of 1873, instead of according to the law at the time of the commencement of the term he was elected to fill out.

Later upon the occasion for issuance of a warrant to Justice SIEBECKER for the first quarter year of his incumbency by appointment to fill the vacancy caused by the death of Justice BARDEEN, opportunity was again presented to the state auditor to pass upon the matter under discussion, the salary incident of the office having been changed during the term for which Justice BARDEEN was elected, to $6,000. It appears such auditor was uncertain as to whether the appointee was entitled to the increase or not, because, whereas, on the former occasion, the act expressly provided the increase should be so awarded, the new act (ch. 138, Laws of 1901) afforded the increase only "to justices thereafter chosen and for terms of office thereafter to commence," expressly excluding those in office as to the remainder of their terms, that being amended by ch. 414, striking out the reference to those thereafter chosen. Thus the question was presented of whether an incumbency by appointment constituted a period denominable

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as "a term of office" within the meaning of the act, as it had been treated theretofore for some forty years under sec. 26 of the constitution aforesaid. The omission of the words "hereafter appointed or elected," found in all previous acts, obviously challenged special attention. The attorney general, being applied to for advice in the matter, gave his opinion to the auditing officer under date of May 13, 1903 (see Biennial Report and Opinions, 1904), to the effect that the term of office mentioned in the act was the constitutional term of ten years of which the appointive term formed a part, and, therefore, that the latter was expressly excluded from effect by the salary increase, and further that any legislative attempt to change the salary incident of the constitutional term of ten years, so as to make it applicable to increase the compensation to an incumbent serving a part of said term by appointment, over the compensation incident to the office at the commencement of such term, would be unconstitutional. Whether the learned attorney general was familiar with the history we have given, does not appear. We may well presume, from the fact that no reference is made to it in his opinion, that he was not. If so, we may well conclude that, in the light of such history, a different opinion might have been given.

Relying on that opinion, the auditing officer ruled against Justice SIEBECKER'S application. Later, as appears, and whether by further advice of the attorney general's office does not appear—but the presumption would be that new light had been shed on the matter which cast grave doubts upon the correctness of the opinion in the mind of the law officer,—the auditing officer reversed his ruling and issued to Justice SIEBECKER a warrant for the increased salary, which had for a considerable length of time been retained.

It does not seem that the change in ch. 138, Laws of 1901, by ch. 414, had any significance, except to cut off opportunity to resign and regain the place by appointment, as Chief Justice DIXON did, and thereby a person in service at the time of

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the passage of the act obtain the benefit thereof. That is suggested by the two elements, "justices hereafter to be chosen" and "for terms hereafter to commence," in conjunction. The words "term of office," as regards changes in salary, had by long usage and many rulings, as we have seen, come to mean, under sec. 26, art. IV, of the constitution, the period of incumbency whether for a full term or a fraction thereof. It is fair to presume that it was used by the legislature in such sense, no other having obtained here during the life of our constitution. That such was the case, is persuasively shown by the fact that, following the restriction of the act to "terms of office thereafter to commence," the act, *ex industria,* provided that justices . . . "now in office shall be paid during the remainder of their terms" the same salaries as theretofore, thus unnecessarily giving significance to the personal element, except to emphasize the idea that the term previously spoken of was the term of incumbency. That construction harmonizes with the whole history of the subject from the formation of the constitution, and is certainly reasonable, if not inevitable, if we concede that "his term of office," as used in sec. 26, art. IV, has reference to the personal element, primarily, instead of to the "term," primarily, being disassociated from such personal element, as in art. VII.

It is the opinion of the court that the view which has so long prevailed, which commenced, so far as discovered, with Chief Justice WHITON, one of the dominating personalities framing the constitution, seconded by Justice COLE, also one of such framers, and has been the guide for many legislatures, justices of this court, and all state officers having to do with the matter, without any disturbance whatever till a question was raised, as we have indicated, under the peculiar wording of the law of 1901, should continue to be the guide; that such construction of sec. 26, art. IV, is permissible, if not plainly required, and that after so long and so harmonious submission to such construction, it should be regarded as the correct one.

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As we have progressed in an endeavor to voice, logically, the court's opinion, reluctance, at first, to yield thereto lessened as the pages of history unfolded and now is entirely displaced. As an original matter, it is not improbable that the term of office spoken of in art. VII is the term of office spoken of in art. IV, and that it is a unit as regards the salary incident, though we must freely confess ambiguity in the situation and reasonableness of the other view, which we conclude, in face of the uniform past, on principle, ought to be followed. For years after the constitution was adopted there were no aids in the books to its construction in respect to the question under discussion. If those who had early to do with the matter had had the benefit of the judicial reasoning on like provisions, which was postponed for some twenty years, a different conclusion might have been reached.

It requires a very clear case to justify changing the construction of a law, conceded to be somewhat involved, which has been uninterruptedly acquiesced in for so long a period as fifty years. It is firmly the opinion of the court, for reasons we have endeavored to state with the fulness the importance of the case demands, that a situation justifying a change does not exist as to the matter in question.

We should say, in passing, that amendments were proposed in the constitutional convention placing the usual restrictions upon changing the salary of a justice of this court, in an appropriate section in the article on the judiciary, but it was not done, as we have seen.

So the conclusion is that the judicial term mentioned in art. VII of the constitution has regard, primarily, to the office, disassociated from the occupant of it; in other words, it contemplates unity, so that several incumbents during the term take mere parts of an entirety; that "his term of office," as used in sec. 26, art. IV, of the constitution, has regard, primarily, to the personal element, the incumbent of the office; contemplates the period of incumbency, whether of a whole term, or a part of the entirety, under art. VII. As to the

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particular incumbent's term of service, during its pendency, the legislature is under complete disability to change the salary incident in any manner or to any extent; but as to any period, within a whole term, filled by appointment or election, the legislature has power, before the commencement thereof, to fix the compensation, different from that incident to the office during the preceding period.

By the Court.—The prayer of the petitioner is granted.

TIMLIN, J. (*concurring*). As I view this matter the only question involved is whether one appointed by the governor to fill a vacancy in the office of justice of the supreme court, which vacancy was caused by the death of the prior incumbent of that office, takes the salary fixed by statute enacted and in force prior to his appointment, but not applicable to the salary of his deceased predecessor in office because enacted, approved, and published after the term of such deceased predecessor had begun.

I reach the same conclusion as the majority, but solely upon the following grounds: Precedents from other states have little advisory value in questions of interpretation, because, however nearly like the words in question may be to those in other state constitutions, they are not identical nor found in like collocation, nor affected similarly by other cognate expressions elsewhere found in the instrument. This weakness of such precedents has been often noted in questions of interpretation. The provision of our constitution relating to increase or diminution of salary is not limited to judicial offices, but includes all public officers, and appears as a general limitation upon legislative power. It restricts the power of the legislature with reference to different classes of persons; relates to the officer, not to the office, to his term, not to the term. It is as follows:

"Sec. 26. The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor after the services shall have been rendered or the contract en-

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tered into; nor shall the compensation of any public officer be increased or diminished during his term of office."

I construe this as wholly personal to each of the classes therein mentioned, including the "public officer," and the expression "during *his* term of office" accords with this construction. Otherwise the framers of the constitution would have used the expression "public office" instead of "public officer," and "the term" instead of "his term."

Again, in other sections of the same instrument where cognate restrictive provisions are found, the words employed are significantly different. As in sec. 10, art. VII, prohibiting judges from holding any other office, it is said:

"They shall hold no office of public trust, except a judicial office, during the term for which they are respectively elected."

Or sec. 12 of art. IV, which provides:

"No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created or the emoluments of which shall have been increased during the term for which he was elected."

The contention of the learned attorney general is that sec. 26 above quoted should be construed as if it read, "during the term for which the first incumbent was elected," instead of "during his term," and as if it applied to the salary fixed at the beginning of the official term of the first incumbent regardless of change of incumbents during this period or term. I think this would be giving the words "public officer" the meaning of "public office," and the personal "his term" the meaning of the different impersonal expression, "the term," and that such construction varies from the usual and ordinary meaning of these words and is therefore inadmissible.

I am convinced that the main purpose of sec. 26, *supra,* is to make public officers independent of the legislative branch of the government as far as possible, and to prevent the in-

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fluence upon the legislative branch of a combination of interested officeholders in an effort to raise their salaries, and these purposes should be considered in construing the provision in question. I do not approach this question of construction from the viewpoint of taking the constitutional official term as a unit and dividing this unit into as many fractions as there may happen to be official incumbents during that term, but I regard the provision as personal to the incumbent of the office. If he enters the office after the change of the salary has taken place he is entitled to that salary, and as to him it cannot be increased or diminished; but if the office is vacated by death or otherwise before the expiration of the term the succeeding incumbent takes the office with the salary fixed by the legislature for that office and in force at the time of the appointment or election of the succeeding incumbent, even though such appointment or election be for part of an unexpired term. I am strengthened in this view because this construction of the constitution was arrived at by Chief Justice WHITON and by Chief Justice COLE, both of whom took part in framing the constitution, and by Chief Justice RYAN and Justice PAINE, and others, in drawing and accepting salaries pursuant to this interpretation. The legislative and executive branches of the state government also put this construction upon the constitution by the enactment of ch. 33, Laws of 1867, ch. 145, Laws of 1868, and ch. 293, Laws of 1873, in each of which statutes it was provided that the increased salary of judges of this court should apply to judges thereafter appointed. As no appointment could be made except to fill out part of an unexpired term, the legislature which enacted, and the governor who approved, these laws considered it not in violation of the constitution that the appointee thereafter appointed to fill out any part of the then existing terms should have the increased salary during "his term." So the departmental officers of the state for nearly half a century have put this construction upon

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the provision of the constitution in question. All this seems to me to much outweigh the advisory effect of foreign judicial precedents upon questions of construction of somewhat similar though not identical provisions, and I have no doubt and have had but little difficulty in arriving at the conclusion that the true interpretation of sec. 26, art. IV, of the state constitution is that he who comes into an office lawfully by election or appointment to fill a vacancy caused by the death, disability, resignation, or removal of a different prior incumbent is not under the restrictions as to increase or diminution of salary which bound the prior incumbent, but takes under the law in force at the time of his appointment or election to fill the vacancy.

SIEBECKER and BARNES, JJ., took no part.

STATE vs. BROOKS and another.

March 9—March 11, 1909

Criminal law: Rape: Conviction of person aiding.

One who was present and aided and abetted another to commit rape may himself be convicted of rape although he did not have carnal knowledge of the woman.

CERTIFIED from the circuit court for Vilas county: A. H. REID, Circuit Judge. *Question answered in the affirmative.*

Both defendants were in due form charged with the crime of rape. The proof was to the effect that *Brooks* had carnal knowledge of the body of the prosecutrix, the act being characterized by all essentials of the crime charged, that *Burns* was present and aided and abetted *Brooks* in the commission of the offense, but did not himself have carnal knowledge of the woman. Both were in due form found guilty, and the cause was duly reported to this court for answer to the ques-

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tion of whether, under such a charge and such proof, it was competent to so convict *Burns*. While the cause was pending here a question similar to that certified up was presented in *Vogel v. State, ante,* p. 315, 119 N. W. 190, and January 5, 1909, decided in the affirmative, whereupon a request was made, signed by the circuit judge who reported the case, by the defendant *Burns,* and by his attorney, as well as by the prosecuting attorney of Vilas county, for answer to be made to the question submitted as aforesaid in accordance with the decision in the *Vogel Case,* and for a return of the record as soon as practicable to the circuit court for Vilas county.

PER CURIAM. The question submitted is in accordance with the decision of this court in *Vogel v. State, ante,* p. 315, 119 N. W. 190, answered in the affirmative, and the case is remanded to the circuit court for Vilas county, Wisconsin, for further proceedings according to law, and the clerk of this court is directed to remit the record as speedily as practicable.

MOEHLENPAH, Administrator, and others, Appellants, vs. MAYHEW, Respondent.

January 9—March 30, 1909.

(1–4) ***Judgment: Prior death of one defendant: Conclusiveness between defendants.*** (13, 14) Res judicata. (5) ***Presumptions: Statutes of other states.*** (6, 7, 13) ***Findings: Materiality: How far conclusive.*** (7–15) ***Rescission of contracts: Sale of remainder: Mutual mistake of fact: Pleading: Fraud or mistake: Supplemental pleadings: Appeal: Reversal.***

[1. Whether a judgment rendered in form against a defendant who died after service upon him, or appearance, and before the trial, is void or merely voidable, not determined.]

2. Parties who were codefendants in a former action are not concluded, as between themselves, by the judgment therein unless there was an issue framed between them covering the point in

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question in subsequent litigation, or unless the plaintiff in the former action made a claim against each defendant which negatived the right claimed in the subsequent litigation by one of them against the other.

3. Where no issue was made by the pleadings between two defendants, it may be shown in a subsequent litigation between them upon a different cause of action that the issue in question was not in fact adjudicated in the former action; and proof of the death of one defendant before trial or verdict might show that as to him and his representatives there was no issue tried on notice and hearing, and hence no decision binding his representatives and his codefendant mutually as between themselves.

4. Where one of several defendants died and such part of the cause of action as was averred against the other defendants survived against them, and the cause thereafter proceeded to trial and judgment against such other defendants without bringing in the successor to the rights and liabilities of the deceased party, such judgment, under secs. 2804, 2805, Stats. (1898), did not affect the deceased or his interest in the subject of the action and has no binding force upon his personal representative and heirs in subsequent litigation between them and one of the surviving defendants in the former action.

5. In the absence of evidence to the contrary it will be presumed that the same statutes exist in another state as in this state.

6. Findings of fact not material to the issues in an action are not binding upon the parties in subsequent litigation.

7. In an action to rescind, on the ground of mental incompetency, fraud, and undue influence, a sale of a remainder subject to a life estate, a finding that at the time of the sale neither party thereto knew of the prior death of the life tenant is material and relevant to the issues.

8. Where there is no doubt as to the subject matter, the mere fact that one party has in fact sold more than he thought he was selling, or the other got more than he expected, is not sufficient to avoid the contract of sale; but where there is a mutual mistake as to the subject matter, that condition is sufficient to avoid the contract.

9. Where the subject matter of a sale, and what both parties supposed they were dealing with, was a right in remainder subject to a life estate and subject further to be partially or wholly used for maintenance of the life tenant, but by reason of the prior death of such tenant, then unknown to either party, they were in fact buying and selling an absolute estate or right immediately available in possession and ownership and not subject to diminution, there was a mutual mistake of fact such as

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would avoid the contract unless the party seeking relief was negligent in making the contract or acquiesced therein after learning of the mistake.

10. The facts stated in the complaint must show a case of fraud and mistake, or fraud or mistake, in order to entitle plaintiff to relief upon either ground which the evidence may establish.
11. A party asking rescission or cancellation of a contract must bring forward all his grounds therefor in one suit, and cannot have his right or claim tried by piecemeal.
12. Under some circumstances a court will, of its own motion, direct a supplemental complaint to be filed if the justice of the case requires it.
13. It is not the findings of the court which conclude the parties in subsequent litigation, but the judgment entered thereon.
14. In an action to rescind a contract on the ground of fraud the findings negatived the fraud, but a further material and relevant finding clearly established a mutual mistake of fact such as, if properly pleaded, would have entitled plaintiff to relief in the absence of negligence or acquiescence. *Held*, that a judgment for defendant on such findings would, if allowed to stand, be an adjudication that, notwithstanding such mistake, the contract is valid and binding upon the parties.
15. In such case, the findings being supported by the evidence, the supreme court reverses the judgment and remands the cause for trial, upon supplemental complaint and answer, of the questions relating to negligence in making the contract or acquiescence therein after discovery of the mistake.

APPEAL from a judgment of the circuit court for Rock county: E. RAY STEVENS, Judge. *Reversed.*

The appeal is from a judgment rendered in a suit in equity brought to rescind an instrument of assignment and recover an amount collected thereunder.

The cause was first argued on October 23, 1908.

For the appellants there were briefs by *Whitehead & Matheson,* and oral argument by *A. E. Matheson.*

For the respondent there was a brief by *E. D. McGowan* and *Burr W. Jones,* and oral argument by *Mr. McGowan.*

A reargument having been ordered on November 10, 1908, the cause was, on January 9, 1909, submitted for the appellants on a brief by *Whitehead & Matheson,* and for the respondent on a brief by *E. D. McGowan* and *Burr W. Jones.*

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The following opinion was filed February 16, 1909:

TIMLIN, J. This case presents several unusual and interesting complications. The plaintiffs, as administrator and heirs at law of Andrew Roberts, deceased, upon a complaint averring mental incompetency on the part of the deceased and fraud and undue influence on the part of the defendant, brought this suit to rescind the contract of sale hereinafter described and recover moneys received by the defendant under such contract. There was no express averment of mistake. The defendant answered denying the incompetency, undue influence, and fraud, admitting and relying upon the execution by the deceased to defendant of an assignment of the interest of the former in the residue and remainder of the estate of one Thomas S. Roberts, and pleaded a judgment of the supreme court for Jefferson county, New York, in an action to construe the will of Thomas S. Roberts brought by the executor of the latter, and in which the defendant in this action and Andrew Roberts and others were parties defendant, wherein it was found and adjudged that the assignment in question was valid and that the defendant *Mayhew* thereby became and was the owner of all the interest of Andrew Roberts under the will of Thomas S. Roberts. This judgment was duly proven, but in the proof it appeared that the action was begun February 11, 1904, findings were made therein on October 22, 1904, and judgment entered April 10, 1905. It also appeared that there was no issue pleaded or tried between the defendants therein, Andrew Roberts and *W. A. Mayhew,* and it otherwise appeared that Andrew Roberts died on June 19, 1904, during the pendency of the action in New York, and that the action was not, prior to judgment, revived against his administrator.

There is an irreconcilable conflict of authority upon the question whether a judgment rendered in form against a defendant who died after service upon him, or appearance, and

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before the trial, is void or merely voidable. *Kager v. Vickery,* 61 Kan. 342, 59 Pac. 628, 49 L. R. A. 153–175, and cases in note. See, also, *La Pointe v. O'Malley,* 47 Wis. 332, 2 N. W. 632, and cases cited. We do not find it necessary to determine this question because it is not involved in the instant case. We are not considering the effect of the judgment as between the executor of the estate of Thomas S. Roberts and the plaintiff and defendant in this cause, but the effect of that judgment as an estoppel between the plaintiffs in this case, claiming under Andrew Roberts, and *W. A. Mayhew,* codefendant of Andrew Roberts in the New York action. In a subsequent litigation between themselves, parties who were codefendants in a former action are not concluded by the judgment in such former action, unless there was an issue framed between such codefendants covering the point in question, or unless the plaintiff in the former action made a claim against each defendant which negatived in effect the right thereafter claimed by the other against his codefendant, as in *Giblin v. North Wis. L. Co.* 131 Wis. 261, 111 N. W. 499; *Strong v. Hooe,* 41 Wis. 659; or in *Devin v. Ottumwa,* 53 Iowa, 461, 5 N. W. 552. See 2 Black, Judgments, § 599 and cases. But in case there is no issue made by the pleadings between the two defendants, then in a subsequent litigation upon a different cause of action it might be shown that the issue in question was not in fact adjudicated. *Grunert v. Spalding,* 104 Wis. 193, 80 N. W. 589. Proof of the death of one before trial or verdict might serve to show that as to him and his representatives in this situation there was no issue tried upon notice and hearing, and consequently no decision binding his representatives and his codefendant mutually as between themselves. *Grunert v. Spalding, supra.* Our statutes, however, provide for such cases.

"Where there are several plaintiffs or defendants in any action, if any of them shall die and the cause of action survives to or against the others the action may proceed, without

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interruption, in favor of or against the survivors. If all the plaintiffs or defendants shall die before judgment the action may be prosecuted or defended by the executor or administrator of the last surviving plaintiff or defendant, as the case may be." Sec. 2804, Stats. (1898).

This part of the section relates to joint rights of action and joint liabilities, and there is also found later in the same section provisions regarding joint and several liabilities. Sec. 2805, Stats. (1898), which covers all other cases of this kind not included in sec. 2804, provides that:

"In case of the death of any of several plaintiffs or defendants, if part only of the cause of action or part or some of two or more distinct causes of action survives to or against the others the action may proceed without bringing in the successor to the rights or liabilities of the deceased party, and the judgment shall not affect him or his interest in the subject of the action."

If we may accept the notes to these sections as evidence, the same statutes exist in New York; but in any event we are authorized to presume they do. *Slaughter v. Bernards,* 88 Wis. 111, 59 N. W. 576; *Rape v. Heaton,* 9 Wis. 328; *Walsh v. Dart,* 12 Wis. 635; *MacCarthy v. Whitcomb,* 110 Wis. 113, 85 N. W. 707, and cases in opinion; *Hyde v. German Nat. Bank,* 115 Wis. 170, 91 N. W. 230; *Edleman v. Edleman,* 125 Wis. 270, 104 N. W. 56. The action in New York was within the words of the statute last quoted; that is to say, one of several defendants died, and such part of the cause of action as was averred against the other defendants survived against them, and consequently the judgment did not affect the deceased or his interest in the subject of the action. *Judson v. Love,* 35 Cal. 463. The judgment has therefore no binding force upon the parties litigant in this action.

Notwithstanding this case was quite close in that respect, the trial court found in favor of the defendant upon the questions of fraud, undue influence, and want of capacity, and under the rule of *Momsen v. Plankinton,* 96 Wis. 166, 71 N. W.

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98, and similar cases, we do not feel justified in disturbing such findings. But the findings and undisputed evidence in this situation of the record present the following facts:

On January 9, 1900, Thomas S. Roberts died testate in the state of New York, leaving one third of the residue of his estate to his brother Andrew Roberts, a resident of Wisconsin, subject, however, with the other two thirds of such residue, to the life use of the same by the widow of Thomas S. Roberts, who had also the right to use so much of the corpus of this residue as might be necessary to properly care for and maintain her. The value of this residue of the estate left by said Thomas S. Roberts was about $8,800, and at the time of his death his widow was about sixty-five years of age and in good health. Under the will of Thomas S. Roberts another third of this $8,800 subject to the life estate of his widow as aforesaid passed to a brother, Eliakim Roberts, but the latter died testate April 12, 1901. Under his will there came to Andrew Roberts certain moneys not necessary to mention here in detail, but which were collected for Andrew Roberts by the defendant, *Mayhew*. In addition to these moneys so collected, there came to Andrew Roberts through the will of Eliakim Roberts, but from the estate of Thomas S. Roberts, a further interest in said residue or remainder of $8,800, amounting to about $600. December 22, 1903, Andrew Roberts assigned his interest in the estate of Thomas S. Roberts and in the estate of Eliakim Roberts to the defendant, *Mayhew,* in consideration of $400, of which $100 was paid in cash and the remainder by a note for $300 bearing four per cent. interest. At the time of such assignment Andrew Roberts was eighty-four years of age, a sufferer from palsy, unable to write, addicted to the use of tobacco and intoxicating liquors, at times to excess, but possessed mental capacity to transact business. By virtue of this assignment the defendant received about June 30, 1905, the sum of $2,558.46, and on January 13, 1906, $587.58. The circuit court, among

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his findings negativing fraud and undue influence and lack of capacity, found as a fact:

"(5) That at the time such assignment was made neither the deceased nor the defendant knew of the death of the widow of said Thomas S. Roberts, which had occurred on August 27, 1903."

Findings of fact not material to the issues in an action are not binding upon the parties in subsequent litigation. *Lathrop v. Knapp,* 37 Wis. 307; *People ex rel. Reilly v. Johnson,* 38 N. Y. 63. But this finding was relevant to the issues of fraud, undue influence, and lack of capacity, made by the pleadings; for if the defendant, *Mayhew,* knew of the prior death of the life tenant and that he was buying an absolute present vested title for a small sum, instead of a remainder subject to a life estate of uncertain duration and contingent in amount although not in title, but concealed this knowledge from the old man, this would be strong proof of fraud. It would be a fact relevant to and which might alone support the charge of fraud or that of undue influence. Indeed, the learned circuit judge in his written opinion suggests that the determination of the case by him might have been different had this fact appeared. On the other hand, had it appeared that Andrew Roberts knew that he was selling, not a remainder, contingent in amount, which he might never live to enjoy, but a present vested estate of the value of about $3,000, for $100 in cash and a note of $300, that fact would be relevant upon the question of his mental capacity to manage his business and make contracts, as well as upon the question of undue influence. It would also be relevant upon the question of fraud, not as establishing, but as tending to negative, fraud on the part of *Mayhew.* So that the fifth finding above quoted is one relevant to the issues made by the pleadings and an important part of such issues, although not the ultimate issuable conclusion of fact set forth in the complaint. It was a fact proper to be determined and

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relevant to the issues, and the quoted finding establishes that it was in fact adjudicated. *Last Chance M. Co. v. Tyler M. Co.* 157 U. S. 683, 15 Sup. Ct. 733; *Grunert v. Spalding,* 104 Wis. 193, 214, 80 N. W. 589; *Wentworth v. Racine Co.* 99 Wis. 26, 74 N. W. 551; *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1. This brings us to the legal effect of the fifth finding.

In *Scott v. Coulson,* [1903] 1 Ch. 453, a contract for the sale of a policy of life insurance was entered into by both parties in the belief that the assured was alive. The assured was at the time dead. The contract was completed by assignment. It was held that the vendors were entitled to have the contract set aside. In the opinion in this case there is cited the familiar case of *Smith v. Hughes,* L. R. 6 Q. B. 597, 611, also *Colyer v. Clay,* 7 Beav. 188, and *Cochrane v. Willis,* L. R. 1 Ch. (App. Cas.) 58. In the last-mentioned case an agreement was entered into by a tenant in tail on the assumption that the tenant for life was alive, when in fact he was dead, and KNIGHT BRUCE, L. J., said:

"It would be contrary to all the rules of equity and common law to give effect to such an agreement or to hold that a person ought to be bound by it."

In *Colyer v. Clay, supra,* a testator by his will dated in 1809 gave to trustees the sum of £2,000 to be invested in funds and held in trust for his wife for life, and after her decease the trustee to pay the said sum and dividends unto his nephew John W. Warren and his nephew John Wilson, share and share alike, in case they should be then alive; but if either of his said nephews should be then dead, then to the survivor of them. After the death of the testator and apparently during the life of his widow, and in June, 1813, John Wilson granted to the plaintiff, Colyer, a certain annuity, and assigned all his reversionary or expectant interest in this £2,000 for the purpose of securing the annuity, and later entered into a contract in writing to sell all his present and fu-

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ture interest and title in and to said sum of £2,000 to the plaintiff. At the time this writing was made, the other nephew, John W. Warren, was dead, but the fact was unknown to the nephew Wilson and to the plaintiff, Colyer, and of course by that death Wilson became entitled not only to one half of the £2,000 contingent upon his surviving Warren, but to an absolute vested title in remainder subject to the life interest of the testator's widow. It was held that by reason of the mutual mistake of the parties the contract could not stand.

The same ruling was made with reference to a contract for the purchase of an annuity, neither party having knowledge at the time of making the contract that the annuitant was dead. *Strickland v. Turner,* 7 Exch. 208. Also where a policy of life insurance was surrendered for a paid-up policy for a smaller sum by the beneficiary without knowledge of either party that the insured was dead. *Riegel v. Am. L. Ins. Co.* 140 Pa. St. 193, 21 Atl. 392, 11 L. R. A. 857; *S. C.* 153 Pa. St. 134, 25 Atl. 1070, 19 L. R. A. 166.

In *Hurd v. Hall,* 12 Wis. 112, the plaintiff purchased from the defendant the right, title, and interest of the latter in a certain certificate of sale issued by the commissioners of school and university lands which conveyed no title or interest to the defendant, and it appeared to the court that both parties were mistaken with reference to the ownership or interest of the defendant in the lands in question, and that there was such a mistake or ignorance of fact which authorized a rescission of the contract.

In *Kowalke v. Milwaukee E. R. & L. Co.* 103 Wis. 472, 79 N. W. 762, the nature and character of the mistake of fact which relieves from a contract is discussed and many illustrative cases cited. In that case the plaintiff, having suffered a personal injury caused by defendant, had executed a release of damages to the defendant which she sought to set aside. It was not a case of mutual mistake of fact, but some of the discussion there found and some of the cases and illustrations

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given are pertinent. The definition found in Pom. Eq. Jur. § 839, is approved, and it is also said that the fact must have been not merely material in the sense that it might have had weight, if known, but that its existence or nonexistence was intrinsic to the transaction—one of the things actually contracted about. And the following from Kerr on Fraud and Mistake is cited with approval:

"Care must be taken in distinguishing cases where the parties are under a mutual mistake as to the subject matter of a contract from cases where there is no doubt as to the subject matter, but the one has in fact sold more than he thought he was selling, and the other got more than he expected." Kerr, Fraud & M. 433.

Where there is no doubt as to the subject matter, the mere fact that one has in fact sold more than he thought he was selling, or the other got more than he expected, is not sufficient to avoid a contract; but where there is a mutual mistake as to the subject matter, that condition is sufficient to avoid the contract. In the instant case the subject matter of the purchase by *Mayhew* and the sale by Roberts was a right in remainder subject to the life of the widow and subject to be partially or wholly dissipated by reason of the necessities of the life tenant. It was analogous to a contingent remainder of one third of the estate. This was the subject matter of the contract and was what both parties to the contract believed they were dealing with; but by reason of the prior death of the widow they were in fact buying and selling an absolute estate or right immediately available in possession and ownership and not subject to further diminution or depletion. There was consequently a mutual mistake of fact as to the subject matter of the sale, and also, as in all such cases, one bought more than he expected and the other sold more than he thought he was selling. This court was therefore, upon the consideration of the case, confronted with this condition, namely: If the judgment affirmed by this court would affirm the validity of

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the sale and conveyance as against this mutual mistake plainly set forth in the findings without any mitigating circumstances, we must refuse to approve of that judgment. On the other hand, if the judgment affirmed by this court upon these findings would be conclusive only against the right of the plaintiffs to set aside the assignment in question for lack of capacity, undue influence, or fraud, we might then affirm the judgment; but this course would enable the plaintiffs to immediately proceed upon the record in this case and have the assignment vacated on the ground of mutual mistake, unless that could be obviated by some affirmative defense, such as negligence on the part of Andrew Roberts. In this condition of the record reargument was ordered upon the following question: "Whether the mutual mistake of fact with reference to the continuance of the life of the widow of Thomas S. Roberts was sufficient to avoid the assignment of December 22, 1903."

Counsel evidently did not understand the situation, because the plaintiffs present that their action is based upon allegations of fraud and not upon a mutual mistake of fact, and the defendant also seems to think that an amendment of the complaint would be necessary and to favor an affirmance of the present judgment. Neither counsel gives us any aid upon the condition here appearing, viz., in a suit for cancellation and rescission for fraud, findings negativing the fraud but clearly establishing a mutual mistake. There is some uncertainty in the rules of equity relative to pleading fraud and mistake. Upon a bill filed for relief on the ground of fraud relief may be granted on the ground of mistake. *Read's Adm'rs v. Cramer,* 2 N. J. Eq. 277. Where an answer averred fraud, relief was given on the ground of mistake. *Berryman v. Graham,* 21 N. J. Eq. 370. On a bill filed on the ground of fraud, relief was granted based on mistake; but the averments of this bill were quite general. *Daniel v. Mitchell,* 1 Story, 172, Fed. Cas. No. 3,562. A distinction

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must be observed between suits for reformation and suits for cancellation or rescission of a contract. In the former suits there must be shown not a mere mistake on one side, but a mutual mistake, or what is equivalent in the law to a mutual mistake, and, in addition, an enforceable contract of the tenor and terms sought to be established by the suit for reformation. On the other hand, cancellation or rescission proceeds upon the ground that there was no contract between the parties by reason of the mistake or fraud. Relief on evidence showing mistake may be had under a bill the gravamen of which is fraudulent representation and undue influence and which does not by name denominate the transaction as being one produced by mistake. *Powell v. Plant* (Miss.) 23 South. 399.

In *Kyle v. Fehley,* 81 Wis. 67, 51 N. W. 257, the counterclaim charged false representations and fraud. The trial court found there was a mistake in drafting the deed by omitting to state therein that the same was made and accepted subject to a certain lease, and that the defendant was induced to consent to this omission by advice of the plaintiff's attorney and in the belief of the correctness of the statement of the latter as to the legal effect of such omission. The judgment was affirmed in this court.

There is also the familiar case of mistake on one side and knowledge of the mistake on the other, and taking advantage of it, which is always sufficient for rescission or cancellation and sometimes for reformation, provided there is another existing contract which may be substituted. *Clark v. Clark,* 55 N. J. Eq. 814, 42 Atl. 98; *Venable v. Burton,* 129 Ga. 537, 59 S. E. 253; *Haviland v. Willets,* 141 N. Y. 35, 35 N. E. 958. But the correct rule, and that supported by the weight of authority, is that the facts pleaded must show a case of fraud and mistake, or fraud or mistake, in the complaint in order to entitle the complainant to relief upon either ground which the evidence may establish. *Clemens v. Clemens,* 28 Wis. 637; *Leighton v. Grant,* 20 Minn. 345; *Daniel v.*

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Mitchell, 1 Story, 172, Fed. Cas. No. 3,562; *Stebbins v. Eddy,* 4 Mason, 414, Fed. Cas. No. 13,342; *Smith v. Babcock,* 2 Woodb. & M. 246, Fed. Cas. No. 13,009; *White v. Denman,* 1 Ohio St. 110; *Williams v. Sturdevant,* 27 Ala. 598.

In the case at bar we are, by reason of the fifth finding above quoted, confronted with the question whether the judgment of the court below denying rescission or cancellation can be upheld in the presence of that finding. If this finding, being relevant to the issues made by the pleadings and actually passed upon and adjudicated, is conclusive in a subsequent litigation between the same parties relative to the same subject matter, the effect must be to enable the plaintiffs upon the termination of the present action to begin an action for rescission on the ground of mutual mistake and to conclude the defendant by this fifth finding upon that question, or else the result must be to adjudge that, notwithstanding the mutual mistake found and presented to us by the finding, the judgment rendered upon such findings asserting the validity of the contract in question is conclusive that such facts established by the fifth finding are insufficient to invalidate the contract of sale. The case therefore discloses a relation between fraud and mistake not often apparent. Kerr, Fraud & M. (3d Eng. ed.) 434, 440; *Gumpel v. Castagnetto,* 97 Cal. 15, 31 Pac. 898. It also discloses an effect of the statute requiring findings of fact which perhaps has not before been fully foreseen. But would the affirmance of this judgment have the effect, while concluding the parties upon the fact that there was a mutual mistake, also to conclude them upon the legal conclusion resting upon this fact and established by the judgment, that the assignment was valid notwithstanding this mutual mistake of fact? Manifestly different answers might be given to this, depending upon what, in such case, is considered the plaintiff's cause of action. Beginning with the relief sought, and analyzing and separating next into forms of

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action, and again into particular averments relative to the case in hand, it is obvious that the further we proceed in this separation and classification the more we narrow the conclusive effect of judgments and impair their efficacy as a means of settling litigated or controverted questions or titles.

In *Wildman v. Wildman,* 70 Conn. 700, 41 Atl. 1, the plaintiff brought an action to have certain deeds executed and delivered by him to the defendant canceled and adjudged void on the grounds that the deeds were given without consideration and not for the purpose of conveying title, but for the purpose of preventing plaintiff's wife from obtaining dower in the event of his death. It appeared that he had brought a prior action for the purpose of having the same deeds canceled and adjudged void on the ground that they had not been delivered to the defendant. It was ruled that from the viewpoint of *res adjudicata* the cause of action asserted in each complaint was the plaintiff's right to cancel the deeds in the first case upon one ground and in the second case upon a different ground, and the court said:

"The rule of *res judicata* does not rest wholly on the narrow ground of a technical estoppel, nor on the presumption that the former judgment was right and just; but on the broad ground of public policy, that requires a limit to litigation, a curb on the litigiousness of the obstinate litigant. Like the statute of limitations, it is a rule of rest. As expressed by Judge PARDEE in *Supples v. Cannon,* 44 Conn. 424, 428: 'The policy of the law is that, if a claim has once been passed upon by a court of competent jurisdiction, it shall not thereafter be controverted between the same parties, and this in the interest of peace.' . . . Every action is brought in order to obtain some particular result which is termed the remedy. This final result is not the 'cause of the action;' it is rather the 'object of the action.' Every judicial action has in it certain necessary elements—a primary right belonging to the plaintiff, and a corresponding primary duty devolving upon the defendant, a delict or wrong done by the defendant, which consisted in a breach of such primary right and duty, a remedial right in favor of the plaintiff, and a remedial duty

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resting upon the defendant springing out of this delict, and, finally, the remedy or relief itself. Every action, however simple, must contain these essential elements; and, however complicated, it has no more. Of these elements, the primary right and duty and the delict or wrong constitute the cause of action."

It was ruled in this case that, although the facts upon which relief was sought were different, the cause of action was the same and was barred by the decision refusing to cancel this deed in the former suit on the ground that it was never delivered. Similar language may be found in *Herman v. Felthousen,* 114 Wis. 423, 90 N. W. 432, and cases there referred to.

So in *Hoseason v. Keegen,* 178 Mass. 247, 59 N. E. 627, a suit in equity to set aside a conveyance of real estate on the ground of lack of consideration, undue influence, and persuasion was held barred by the former adjudication in favor of the defendant upon a bill to set aside the same deed on the ground of fraud. HOLMES, C. J., said:

"The object and petitory conclusions of both suits are the same: to annul the effects of the same deed by a reconveyance. *Gillespie v. Russel,* 3 Macq. 757, 760. It is true that the ground on which the recovery now is sought differs somewhat from that formerly alleged; but so far as appears, both bills go on generically the same footing, that Mary McLaughlin was given an improperly created motive for action by the defendant, and differ only as to what the motive was." *Barnes v. Huntley,* 188 Mass. 274, 74 N. E. 318.

In *Shepardson v. Cary,* 29 Wis. 34, an action was brought to enforce an equitable lien upon certain property after a judgment had been rendered against the plaintiff in an action at law against the same defendant for conversion of the same property on the ground that plaintiff had shown no title to the property against the defendants. The court held the former judgment a bar. It is said:

"The remedy at law, therefore, founded on the legal title or right, is equivalent to that given in equity, founded on an

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equitable title or lien. It is in every case coextensive and concurrent with the remedy in equity, and, being so, it would seem necessarily to follow that the judgment in an action at law would bar and estop the party subsequently resorting to his suit in equity upon the same subject or ground of action, and *vice versa.*"

Upon the premises assumed by the court the foregoing quoted paragraph would be a correct conclusion of law, otherwise not. *Wis. F. & M. Ins. Co. Bank v. Mann,* 100 Wis. 596, 76 N. W. 777.

In *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1, where the subject received great consideration, it was decided that a judgment is conclusive between the parties thereto and their privies in a second action on the same claim or cause of action as to all questions that were or might have been litigated in the first action, and is likewise conclusive in a second action upon a different claim or cause of action as to every proposition within the issues in the first or former action which was presented for adjudication and decided.

Another rule of law requires a party to bring forward in one suit all his grounds for rescission or cancellation and forbids the trial of such a right or claim by piecemeal. *Stark v. Starr,* 94 U. S. 477; *Bendernagle v. Cocks,* 19 Wend. 207, 32 Am. Dec. 448; 2 Black, Judgments, § 734; *Caston v. Perry,* 1 Bailey, 533, 21 Am. Dec. 482; *Dodd v. Scott,* 81 Iowa, 319, 46 N. W. 1057, 10 L. R. A. 360; *Dowell v. Applegate,* 152 U. S. 327, 14 Sup. Ct. 611; *Thompson v. Myrick,* 24 Minn. 4.

With reference to the effect of the judgment appealed from in the instant case, we are convinced that its legal effect, if allowed to stand, is to adjudicate that, notwithstanding the mutual mistake presented by the fifth finding, the contract entered into under such mistake is valid and binding upon the parties, because it is not the findings but the judgment which constitutes the former adjudication. *Denike v. Denike,* 44 App. Div. 621, 60 N. Y. Supp. 110; *Whitney v. Bayer,*

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101 Mich. 151, 59 N. W. 414; *Rauwolf v. Glass,* 184 Pa. St. 237, 39 Atl. 79; 2 Black, Judgments, §§ 609, 621; *Wolf River L. Co. v. Brown,* 88 Wis. 638, 60 N. W. 996. Thus we would be called upon to pronounce a judgment upon certain facts which do not in the law warrant such a judgment. The case, however, has been fully tried upon the issues of fraud, incapacity, and undue influence. We therefore permit all the findings to stand as they now are. *Braunsdorf v. Fellner,* 76 Wis. 1, 45 N. W. 97. Mutual mistake of the kind and under the circumstances established here will avoid a contract, unless there has been negligence in making the contract by the party seeking relief or there has been acquiescence in the contract with knowledge of the mistake. What facts will be sufficient to warrant the inference of such negligence or such acquiescence in this class of cases may be found discussed in the adjudged cases. Our statute (sec. 2687, Stats. 1898) provides for supplemental pleadings by the parties, limiting them to facts occurring or discovered since the former pleading. This statute is adapted from the former equity practice, and a supplemental bill could be filed at any time during the progress of the cause, even after a hearing or decree. *Baker v. Whiting,* 1 Story, 218, 233, Fed. Cas. No. 786; *Goodwin v. Goodwin,* 3 Atk. 370; *Dodge v. Dodge,* 29 N. H. 177. But it was also settled that a court would under some circumstances *ex mero motu* direct a supplemental bill to be filed if the justice of the case in the opinion of the court required this to be done. *Mutter v. Chauvel,* 5 Russ. 42; *Wood v. Mann,* 2 Sumn. 316, Fed. Cas. No. 17,953; *Veazie v. Williams,* 3 Story, 54, 67, Fed. Cas. No. 16,906.

Because we are unwilling to affirm the judgment in favor of the defendant or to order judgment in favor of the plaintiffs upon the facts found and presented to us by the court below and at the same time consider the facts so found to be supported by evidence, it seems best to reverse the judgment of the court below and to remand the cause for trial, upon

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supplemental complaint and answer, of the questions relating to negligence, if any, of Andrew Roberts in entering into this contract, and the acquiescence, if any, of Andrew Roberts or the plaintiffs in the contract after discovery of the mutual mistake.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

A motion for a rehearing was denied March 30, 1909.

STATE vs. SBRAGIA.

January 9—March 30, 1909.

Criminal law: Sale of cigarette paper: Coupon in sealed package of tobacco: Interstate commerce.

1. The sale, by a retail merchant in this state, of a sealed package of tobacco, purchased from a wholesaler in the regular course of business, containing a coupon stating that a certain foreign corporation would send a specified quantity of cigarette paper to any one transmitting to it by mail three of such coupons, is a violation by such retailer of sec. 1, ch. 82, Laws of 1905, which prohibits any person "by himself, his servant or agent, or as the servant or agent of any other person, directly or indirectly, or upon any pretense, or by any device," from selling, giving away, or otherwise disposing of any cigarette paper.
2. The retailer in such a case is the principal in the sense that a sale of the package includes the sale of a coupon, and an agent in the sense that he acts for the foreign dealer in the latter's effort to supply customers in this state with cigarette paper.
3. Such a sale does not involve any question of interstate commerce.

DODGE, J., dissents.

REPORTED from the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Question answered in the affirmative.*

Action reported from the municipal court of Milwaukee county under sec. 4721, Stats. (1898).

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The question involved in the action was whether the defendant was guilty of having violated ch. 82, Laws of 1905.

The cause was duly submitted on the charge made in due form and a plea of not guilty and a stipulation of facts.

The facts agreed upon were, in substance, as follows: The defendant on June 16, 1908, in Milwaukee county, Wisconsin, sold and delivered to Samuel Burden a sealed package of smoking tobacco, labeled as "Duke's Mixture Smoking Tobacco." Upon opening the package it was found to contain a coupon, so called, to the effect that upon receipt of three of such coupons through the mails by "Duke's Mixture Department 8, 111 5th Ave., New York City, The American Tobacco Co. Mfgr., Factory No. 42, 4th Dist. N. C.," would send to the one transmitting them a specified amount of Duke's Mixture cigarette paper. The Duke's Mixture Department named in the coupon is a department of the tobacco company mentioned, which is a foreign corporation. The defendant is a retail merchant in the city of Milwaukee, dealing, among other things, in tobacco at retail. He purchased the package sold as aforesaid in the open market in the regular course of business from a wholesale dealer for the purpose of supplying his retail trade.

The defendant was duly adjudged guilty of having unlawfully offered for sale cigarette wrappers and cigarette paper for the purpose of being filled with tobacco for smoking, contrary to ch. 82, Laws of 1905. Thereupon further proceedings in the cause were stayed pending a result of a report of the same to this court, as to the question of law involved.

The trial court being of the opinion that the facts stipulated as aforesaid presented a question of law of such importance and doubtful character as to require final solution by this court, certified the case for such solution pursuant to sec. 4721, Stats. (1898), the defendant consenting thereto.

The *Attorney General,* for the plaintiff. [No brief on file.]

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The cause was submitted for the defendant on the brief of *Winkler, Flanders, Bottum & Fawsett.*

The following opinion was filed January 26, 1909:

MARSHALL, J. The question presented for solution is this: Is a sale or gift of an order or paper, characterized as a coupon in this action, by a person in this state to another therein as part of an entire transaction including the sale of a package of tobacco, entitling the recipient, in case of his obtaining two other like papers and sending all by mail to a designated dealer in tobacco products and cigarette paper outside the state, to receive therefrom a specified quantity of cigarette paper,—a violation by such person of sec. 1, ch. 82, Laws of 1905, prohibiting "any person" "by himself, his servant or agent, or as the servant or agent of any other person, directly or indirectly, or upon any pretense, or by any device," from selling, offering for sale, keeping for sale, giving away, or otherwise disposing of "any such cigarettes, cigarette paper," etc.?

That a transaction of the nature stated falls within the spirit of the statute seems beyond reasonable controversy, and that it falls within its letter seems hardly less plain.

It appears that the scheme is but a bald subterfuge to cloak the real purpose to sell or give away cigarette paper to persons in this state in circumvention of the law, the local dealer being the principal in the sense that a sale of a package includes the sale of a coupon, and an agent in the sense that he acts for the foreign dealer in the latter's efforts to supply customers in this state with cigarette paper.

Counsel for the defendant do not seem to seriously contend to the contrary of the foregoing, and the learned attorney general appears to unite with them in presenting the matter from a common viewpoint, exempting the defendant from liability upon the ground hereafter stated.

We have the anomalous situation of counsel for defendant

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contending, in the main, that the stipulated facts do not show a punishable violation of the cigarette law because such law is ineffective as regards an act requiring interstate commerce to effectuate it by putting the consumer in possession of the prohibited article, and the learned attorney general subscribing to the same view and joining with defendant's counsel in urging the position upon the attention of this court as unavoidably requiring an answer to the submitted question in defendant's favor. Doubtless, the state's officer was unable to see any escape from such position and so, in justice to the defendant and the court as well, frankly made known his opinion in that regard instead of contending to the contrary. That is commendable but does not preclude the court from considering, or, perhaps more correctly stated, excuse it for failing to consider, the question as involving the element of serious doubt discovered by the learned trial court, warranting the certification to this court.

The statute seems in effect to prohibit, as plainly about as English words could be used to that end, any one in this state as principal or agent, directly or indirectly, from being concerned in selling or giving away to any person in this state cigarettes or cigarette paper. Significant to that effect are the words "directly or indirectly, or upon any pretense, or by any device." The sale of the package of tobacco with the coupons inclosed, exchangeable for cigarette paper, would not have been any different if the package had contained such paper instead of the equivalent. Can any one fairly say that was not a mere pretense or device resorted to for disposing of such paper while giving the transaction a different color? In the opinion of the court the answer must be as here indicated.

The stipulated facts, as we view them, do not raise any question of interstate commerce and, therefore, the able arguments of counsel on both sides that they do, and that the proper solution thereof is fatal to the prosecution, we omit to consider.

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By the Court.—The question submitted is answered in the affirmative, and the cause remanded for judgment upon the conviction.

DODGE, J. (*dissenting*). In the statement of facts should be noted absence of any knowledge on defendant's part that the sealed package contained the so-called coupon. I am unable to bring my mind to the view that the sale and delivery of a sealed package of tobacco, purchased by the seller of a wholesaler, is in any reasonable sense a sale of, or an offer to sell, cigarette papers in Wisconsin merely because the manufacturer has clandestinely inserted in such package an offer that, upon performance of certain conditions, he will sell at New York cigarette papers to any person producing that and two other similar notices. No argument can add to the mere statement of the proposition.

I think, too, that several phases of interstate commerce must be involved before the acts of defendant can in any way be connected with the sale of cigarette papers to any one. The sale of a magazine containing an advertisement of the same offer by a New York merchant would to my mind present exactly the same questions.

I therefore am constrained to agreement with the attorney general that no crime is disclosed, and to dissent from the judgment of the court.

Upon a motion for a rehearing counsel for the defendant contended, *inter alia,* that regarding the act of the defendant as a sale of, or an offer to sell, cigarette paper, it is conceded that the cigarette paper to which the sale or offer to sell referred was in another state and that the so-called sale or offer to sell contemplated its transportation into this state for delivery in consummation of the sale or offer. This made it an act of interstate commerce. *U. S. v. Swift & Co.* 122 Fed. 529; *Swift & Co. v. U. S.* 196 U. S. 375; *U. S. v. Addyston P. & S. Co.* 85 Fed. 271, 294, 29 C. C. A. 141, 46 L. R. A. 122;

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Robbins v. Shelby Co. Tax. Dist. 120 U. S. 489; *Butler Bros. S. Co. v. U. S. R. Co.* 156 Fed. 1, 16; *Miller v. Goodman,* 91 Tex. 41, 40 S. W. 718; *Cook v. Rome B. Co.* 98 Ala. 409, 413, 12 South. 918; *Ware v. Hamilton Brown S. Co.* 92 Ala. 145, 9 South. 136; *Culberson v. Am. T. & B. Co.* 107 Ala. 457, 19 South. 34; *Cooper Mfg. Co. v. Ferguson,* 113 U. S. 727; *Emert v. Missouri,* 156 U. S. 296, 319; *Brennan v. Titusville,* 153 U. S. 289; *Caldwell v. North Carolina,* 187 U. S. 622, 632; *Kehrer v. Stewart,* 197 U. S. 60; *State v. Trotman,* 142 N. C. 662, 55 S. E. 599; *Stoutenburgh v. Hennick,* 129 U. S. 141; *Asher v. Texas,* 128 U. S. 129; *Ex parte Loeb,* 72 Fed. 657; *State v. Lagarde,* 60 Fed. 186; *Carstairs v. O'Donnell,* 154 Mass. 357; *Bloomington v. Bourland,* 137 Ill. 534; *State v. Scott,* 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461; *Kirkpatrick v. State,* 42 Tex. Crim. 459, 60 S. W. 762; *French v. State,* 42 Tex. Crim. 222, 58 S. W. 1015; *Crutcher v. Kentucky,* 141 U. S. 47.

The motion was denied March 30, 1909.

HICKS PRINTING COMPANY, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

February 18—March 30, 1909.

Contracts: Construction: Written and printed provisions: Practical construction: Illegality: Railroads: Advertising to be paid for in transportation: Accord and satisfaction.

1. Written provisions inserted in a printed form of contract are to control if they cannot be reconciled with the printed portions.
2. The practical construction of a contract by the parties acting under it is entitled to much weight.
3. Where a contract is fairly open to two constructions, by one of which it would be lawful, while by the other it would be unlawful and one party would be subjected to a forfeiture, the former construction should be adopted.

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4. Plaintiff agreed to publish in its newspaper, during the year 1906, advertising matter (time cards, etc.) as the same might be furnished by the defendant railway company, "to be charged at regular rates to the amount of $400;" and "in full consideration of the above advertising" defendant agreed "to issue in payment $400 worth of transportation." The words first above quoted were written into the printed form of contract furnished by defendant, and had not appeared in previous contracts between the parties. This was the first contract made between them after ch. 362, Laws of 1905, had made it unlawful for a railway company to charge one person or corporation a higher rate than another for transportation and had imposed a forfeiture for so doing. In November, 1906, plaintiff wrote, stating that it had given defendant a great deal more advertising than the contract called for, and asked as a favor that defendant increase the contract to the amount of $50. This request was granted, and a supplementary contract made amending the original contract accordingly. The value of the advertising during the year at regular rates was more than $1,600. *Held:*

(1) The advertising done was covered by the express contract.

(2) The words written into the form of contract as stated would indicate that plaintiff might charge for advertising done in excess of $400, but the practical construction placed by plaintiff on the contract when he obtained the amendment would indicate the contrary; these two considerations largely neutralizing each other.

(3) In that situation, since a construction of the contract which would deprive plaintiff of the right to charge more than $400 would make it unlawful and subject defendant to a forfeiture under the act of 1905, it must be construed as entitling plaintiff to charge the full value of the advertising in excess of what was paid for in transportation.

(4) There being no controversy between the parties when the supplemental contract was made in November, 1906, and no settlement then made of any existing dispute, that transaction did not constitute an accord and satisfaction.

[5. Whether advertising could be received in payment for transportation under ch. 362, Laws of 1905, not determined.]

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The plaintiff publishes a newspaper at Oshkosh, Wisconsin, and the defendant is a railway company. For several years

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preceding 1906 the plaintiff did advertising for the defendant, which was paid for in transportation. The advertising in a general way consisted of publishing time cards and such announcements as the railway company desired to make. In December, 1905, the defendant forwarded to the plaintiff written duplicate unsigned contracts for execution intended to cover the year 1906. Certain changes were made therein by plaintiff, and the contracts as changed were delivered to the agent of the defendant and were forwarded to it for signature, and were signed by the defendant as amended, and one of the duplicates was returned to the plaintiff. The 1906 contract as amended was different in one particular, which will be referred to in the opinion, from the prior contracts made between the parties. Apparently, about November, 1906, transportation had been furnished the plaintiff to the amount provided for in the contract. On November 8, 1906, the plaintiff wrote the defendant that it would very much like to increase the contract to the amount of $50. As a result of such request a supplementary contract was then made between the parties, reading as follows:

"The undersigned hereby agree that, on account of additional space required by the *Wisconsin Central Railway Company* for reading notices and display advertisements during the year 1906, the amount of contract appended hereto is hereby amended and increased to provide for the payment by the *Wisconsin Central Railway* to the publisher, whose signature appears below, of transportation to the amount of $50 in addition to amount called for in original contract."

The plaintiff offered proof on the trial tending to show that the advertising done by it for the defendant for the year 1906 at its regular rates of charge amounted to $1,612.90, and the referee and the court found the fact to be in accordance with this testimony. The plaintiff brought suit on *quantum meruit* to recover the alleged balance due it for advertising over and above the amount provided for in the original and supplementary contracts, to wit, the sum of $450. Plaintiff

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was awarded judgment in the sum of $1,162.90, together with interest thereon to January 1, 1907. From such judgment this appeal is taken.

The appellant insists that the court erred (1) in the construction placed upon the original contract; and (2) in failing to find that the supplementary contract constituted an accord and satisfaction of the claim upon which suit is brought.

For the appellant there was a brief by *Walter D. Corrigan, W. A. Hayes,* and *Clifton Williams,* and oral argument by *Mr. Hayes.* To the point that the making of the supplemental contract amounted to an accord and satisfaction, they cited *Continental Nat. Bank v. McGeoch,* 92 Wis. 286, 312, 314; *Kercheval v. Doty,* 31 Wis. 476, 484, 487; *Sharp v. Mauston,* 92 Wis. 629, 631; *Wheeler v. Meriden C. Co.* 23 Wis. 584; *Zimmer v. Becker,* 66 Wis. 527, 531; *Woodford v. Marshall,* 72 Wis. 129; *Galusha v. Sherman,* 105 Wis. 263, 268; *Perkins v. Owen,* 123 Wis. 238, 244.

For the respondent the cause was submitted on the brief of *Hume & Oellerich.*

BARNES, J. The contract involved on this appeal stated in precise terms that it commenced January 1, 1906, and terminated December 31, 1906. The principal controversy arises over the meaning of the following paragraph in the contract:

"Party of the second part hereby agrees to publish in the aforesaid publication during the life of this contract, advertising in the form of time cards, display, or readers, as may be furnished from time to time, necessary and desirable changes in said advertisements to be made on the request of and without expense to the party of the first part, and to be charged at regular rates to the amount of $400. In full consideration of the above advertising, party of the first part agrees to issue in payment $400 worth of transportation. . . ."

The plaintiff contends that the contract covered advertising to be charged for at regular rates to the amount of $400 only,

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and that it is entitled to recover on *quantum meruit* for all advertising done during the life of the contract in excess of such amount. The defendant claims that transportation furnished to the amount of $400 was in full payment of all advertising of the character specified during the term covered by the contract, and that the clause, "to be charged at regular rates to the amount of $400," is a mere designation of the value of the consideration passing from each to the other. The plaintiff agreed to publish during the life of the contract—that is, from January 1, 1906, to December 31, 1906—advertising matter as the same might be furnished. This undertaking seems to be absolute, so that the advertising done was covered by the written contract. The phrase, "to be charged at regular rates to the amount of $400," does not obviate the agreement on the part of the publisher to publish the advertisements furnished during the year 1906. It does leave the contract ambiguous as to whether the publisher might charge for advertising done in excess of the $400. But the next sentence in the contract contains the following provision: "In full consideration of the above advertising, party of the first part agrees to issue in payment $400 worth of transportation." So we have the anomalous situation of the plaintiff agreeing to publish during the year 1906 such "time cards" and "readers" as might be furnished by the railway company, and to receive in payment for such service $400 worth of transportation, coupled with a provision that the advertising matter furnished was to be "charged at regular rates to the amount of $400." There is no claim that any advertising was done during the year that did not fall within the designation of "time cards, display, or readers" mentioned in the contract.

Obviously there is an ambiguity on the face of the contract, because it is not clear from its terms whether the advertising done in excess of $400 is to be paid for by the defendant otherwise than in transportation, or whether the $400 in transportation is intended to cover all advertising done regardless of

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its value. Recurring to extraneous matters *dehors* the contract, we are not greatly aided in arriving at a true construction of the instrument. The parties had been doing business for several years, but none of their contracts prior to the one we are considering contained the clause "to be charged at regular rates to the amount of $400." This clause is meaningless if the defendant's construction of the document is adopted, and it is only fair to assume that the parties meant something when they inserted it in their contract for 1906. The fact of its insertion strongly tends to support plaintiff's construction. This view gains additional support from the fact that the clause we are considering was written into the printed form of contract furnished by the defendant. It is a canon of construction that where a contract "is written in part and printed in part, as where it has been filled in upon a printed form, the parties usually pay much more attention to the written parts than to the printed parts. Accordingly, if the written provisions cannot be reconciled with the printed, the written provisions control." 2 Page, Contracts, § 1119, and cases cited; *Gilbert v. Stockman,* 76 Wis. 62, 65, 44 N. W. 845. On the contrary, the practical construction placed on the agreement by the plaintiff strongly tends to support the contention of the defendant that the parties intended that the entire compensation of the plaintiff should be limited to $400 in transportation. This is shown by plaintiff's letter of November 8, 1906, in which it stated that it had given the defendant a great deal more advertising than its contract called for, and requested as a favor that $50 worth of additional transportation be given it, as well as by some other circumstances of minor importance. The request for the additional transportation was granted. While either of the facts alluded to might be persuasive if the other were absent, they largely neutralize each other and do not afford any very satisfactory explanation of the ambiguity.

It is a verity in the case that the value of the advertising

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done by the plaintiff amounted to over $1,600. If we adopt the construction urged upon us by the defendant, then the contract is clearly unlawful and void and the defendant is liable to a large penalty for having made and carried it out. By ch. 362, Laws of 1905, the defendant is required to file tariffs showing its charges for the transportation of passengers (sec. 4), and it is made unlawful for it to charge, demand, collect, or receive a greater or less compensation for the carriage of passengers than that specified in the tariffs (sec. 4, subd. *c*), and in the event of its demanding from any person or corporation a greater or less compensation for any service rendered in the transportation of persons than that prescribed in the published tariffs, or than it charges, collects, or receives from any other person or corporation for a like and contemporaneous service, it is guilty of unjust discrimination, which is declared to be unlawful, and upon conviction thereof must forfeit and pay into the state treasury not less than $100 nor more than $10,000 (sec. 22). It needs no argument to show that if the contract under consideration required plaintiff to pay four times as much for the transportation used by its officers and servants as the public was called upon to pay generally, the contract was in plain contravention of the provisions of the law in question. It is significant that the change in form was made in the first contract entered into after the passage of the act referred to. The construction now contended for by defendant leads it "from the frying pan into the fire."

If the contract in question were reasonably plain, the results that might follow from its interpretation could make no difference in placing the proper construction thereon. But it is not.

"When the terms of a contract are indefinite, uncertain, and susceptible of two constructions, and by giving them one construction one of the parties would be subjected to a forfeiture, and by giving them the other no such forfeiture would

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be incurred and no injustice would be done to the other party, the contract should be so construed as not to create the forfeiture." *Jacobs v. Spalding,* 71 Wis. 177, 190, 36 N. W. 608; *Weidner v. Standard L. & A. Ins. Co.* 130 Wis. 10, 19, 110 N. W. 246; *Appleton I. Co. v. British Am. Assur. Co.* 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100; *Wier v. Simmons,* 55 Wis. 637, 13 N. W. 873.

If one construction will make a contract legal and another will make it illegal, the former construction is to be preferred. *Alfree v. Gates,* 82 Iowa, 19, 47 N. W. 993; *Pitney v. Bolton,* 45 N. J. Eq. 639, 18 Atl. 211; *North Pac. L. Co. v. Spore,* 44 Oreg. 462, 75 Pac. 890; *Wyatt v. Larimer & W. I. Co.* 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; 3 Page, Contracts, § 1120. This court has said that "where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted." *Waters v. McGuigan,* 72 Wis. 155, 157, 39 N. W. 382; *Hobbs v. McLean,* 117 U. S. 567, 6 Sup. Ct. 870; *U. S. v. Cent. Pac. R. Co.* 118 U. S. 235, 6 Sup. Ct. 1038.

It is argued in behalf of the plaintiff that the contract was void *ab initio* under the interstate commerce act, because the defendant could not contract to receive anything but money in payment for transportation, and that plaintiff is entitled to recover *quantum meruit* as if no express contract had been made. In support of this proposition, we are cited to Tariff Circular No. 14*a*, p. 43, issued by the Interstate Commerce Commission, as placing a correct construction on the federal law. Sec. 2 of the interstate commerce act, as originally drawn, made it unlawful for any common carrier to charge, collect, or receive a greater or less compensation for any service rendered in the transportation of passengers than it charged other persons for a like and contemporaneous service under substantially similar circumstances and conditions. For the purposes of this case, the differences between this section and sec. 4 of the Wisconsin law are not material. Prior to the passage of the Hepburn act (Act June 29, 1906, ch. 3591,

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34 U. S. Stats. at Large, 584, U. S. Comp. Stats. Supp. 1907, p. 892) the federal law was interpreted to permit a carrier to exchange transportation in payment for advertising, and the Interstate Commerce Commission at least tacitly assented to such construction. The Wisconsin Railroad Commission likewise ruled under our law that the statute did not forbid the exchange of transportation for advertising, provided the exchange was equal and that mileage was furnished at the regular rate of charge equal in value to the advertising done at the usual and customary rates of charge. The amendment of 1906 to sec. 6 of the interstate commerce act prohibited a greater, less, or *different* compensation being charged one party than was charged another for a like service in the transportation of persons or property. The Interstate Commerce Commission construed the word *"different"* in the amended law as prohibiting carriers from receiving anything but money in payment for transportation, inasmuch as that was the only common medium that could be used. It evidently reached the conclusion that advertising was a different compensation for mileage than money, although each might have the same value, and rule 54, effective September 15, 1906, was promulgated to meet the existing conditions. This case was not tried to fit the interstate commerce law if that law had been properly construed prior to the passage of the Hepburn act.

It is not necessary to decide whether advertising could be received in payment for mileage under ch. 362, Laws of 1905. The carriers and the commissions with which they had to deal construed the law as giving the right of exchange, provided things of equal value were swapped. There is no positive prohibition in the law against making such exchange, and, unless it be held that there is an implied one, the construction given was correct. A contract made to exchange transportation for advertising of equal value might well be entered into in perfect good faith and in the belief that it was legal. Neither legality nor good faith could be presumed in favor of

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a contract calling upon the plaintiff to pay four times what the transportation furnished was worth. The contract being ambiguous, we think that construction should be adopted which would acquit the parties of entering into a contract which they must have known would fall under the ban of the law.

We fail to see where there is any question of accord and satisfaction in the case. There was no controversy of any kind between the parties when the supplemental contract of November, 1906, was made, and no settlement was made of any then existing dispute. The transaction lacked the necessary elements vital to an accord and satisfaction. It follows that the judgment of the circuit court is correct.

By the Court.—Judgment affirmed.

LEASUM, Respondent, vs. GREEN BAY & WESTERN RAILROAD, Appellant.

March 9—March 30, 1909.

Railroads: Injury to passenger riding in car with live stock.

Defendant had contracted to carry plaintiff's live stock and himself in charge thereof on the same train, which had a passenger coach attached. Plaintiff was in the car with the live stock while it was being switched into the train, and was thrown down and injured by its being bumped against the other cars. There was evidence that, after such collision, the conductor asked plaintiff if he was all right and could go ahead with the car, to which plaintiff replied that he thought so, and he was then permitted to ride in the car to its destination; also that a brakeman who had had orders from the agent to switch the car into the train and who superintended that work knew that plaintiff was in the car and asked him if everything was all right as they were about to hitch on. *Held*, that although there was no express contract, no actual necessity, and no custom shown entitling plaintiff to ride in the car with the stock, yet the jury might well infer from the evidence that the contract was in harmony with the conduct of the parties thereunder, and might find that plaintiff was justified in supposing that he was rightly in the car and hence was not guilty of contributory negligence in being there.

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APPEAL from a judgment of the circuit court for Trempealeau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This action was brought to recover damages for injury to person and to property. Only so much of the controversy as relates to injury to the person is involved on this appeal.

The plaintiff loaded a car containing household goods, a cow, and some chickens, at Whitehall, Wisconsin, for shipment to Keokuk, Iowa. The car was loaded about 7:30 o'clock on the morning of September 2, 1905, and was to be carried by a west-bound accommodation train to which a passenger coach was attached for the carriage of passengers. This train arrived at Whitehall about one hour and thirty minutes after the car was loaded. In the meantime the car had been switched to a convenient position for being attached to the west-bound train by the engine of another freight train. The plaintiff was in the car at the time it was switched and talked with one of the brakemen of the freight train. His evidence fairly shows that at the time the west-bound train arrived which was to carry the car in question the household goods had been arranged in the car. There is no evidence tending to show that any of the employees engaged in the management of the west-bound train knew of the presence of the plaintiff in the car when the same was switched into the train in which it was to be carried. In backing the car into the train the connection between the car and the engine broke, the air brakes refused to work, and the car was run against the other cars of the train that were standing on the track, with considerable force, so that plaintiff claimed he was thrown down and received injuries for which the suit was brought.

The plaintiff paid to the defendant $38 in consideration for transporting the car and himself from Whitehall to Keokuk. The complaint alleged that in consideration of such payment the defendant "agreed to carry the said plaintiff in charge of said live stock on the train where the same was so carried, from Whitehall, Wisconsin, to Keokuk, Iowa." This allegation of the complaint was admitted by the answer. The

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trial resulted in a verdict and judgment for the plaintiff, assessing his damages at $500.

Numerous errors are assigned, but counsel for appellant stated on the oral argument that all such errors were waived, except the refusal of the court to grant a nonsuit or to direct a verdict on the ground that the defendant was not liable for the injuries sustained, for the following reasons: (1) That the defendant had no knowledge nor notice that the plaintiff was riding in the car in question; (2) that such car was not one provided for the carriage of persons; and (3) that said plaintiff had no right to occupy the car at the time of the injury.

John C. Gavency and *R. S. Cowie,* for the appellant, cited, among other cases, *Ohio & M. R. Co. v. Hatton,* 60 Ind. 12; *Ill. Cent. R. Co. v. O'Keefe,* 168 Ill. 115, 48 N. E. 294; *Mendenhall v. A., T. & S. F. R. Co.* 66 Kan. 438, 71 Pac. 846; *Walker v. Green,* 60 Kan. 20, 56 Pac. 477; *Chicago & E. R. Co. v. Field,* 7 Ind. App. 172, 34 N. E. 406; *McNamara v. G. N. R. Co.* 61 Minn. 296, 63 N. W. 726; *Texas & P. R. Co. v. Black,* 87 Tex. 160, 27 S. W. 118; 2 Hutchinson, Carriers, sec. 999; *McGraw v. Railway Co.* 135 N. C. 264; *Mo., K. & T. R. Co. v. Williams,* 91 Tex. 255; *Atchison, T. & S. F. R. Co. v. Lindley,* 42 Kan. 714, 22 Pac. 703.

For the respondent there was a brief by *Anderson & Ekern,* and oral argument by *H. L. Ekern.*

Barnes, J. It is a general rule that a person desiring to become a passenger on a railway train must enter one of the coaches or cars set apart for passengers, and, if without the knowledge of the agents of the railway company he seeks to ride on some other portion of the train and is injured, he cannot recover damages on account of the mere negligence of the carrier. 4 Elliott, Railroads (2d ed.) § 1578, and cases cited; 2 Hutchinson, Carriers, § 999, and cases cited; *Jenkins v. C., M. & St. P. R. Co.* 41 Wis. 112.

Where the agent of a railway company makes a contract

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with the shipper of live stock by which such shipper is permitted to ride in the same car with the stock, such contract is binding upon the company if the agent was acting within the scope of his apparent authority in making it, particularly where it is shown that it was usual and customary for shippers of live stock to ride in the car with the animals. Such shipper is not guilty of contributory negligence in riding in such car if it appears that it was reasonably common and consistent with his employment for him to do so. *Lawson v. C., St. P., M. & O. R. Co.* 64 Wis. 447, 24 N. W. 618; *Chicago & A. R. Co. v. Winters,* 175 Ill. 293, 51 N. E. 901; *Orcutt v. N. P. R. Co.* 45 Minn. 368, 47 N. W. 1068.

Where a party who accompanies live stock to care for the same rides most of the time in the caboose, but finds it necessary to ride in the car with the stock a portion of the time in order to care for them, and he is injured while so doing, he is not guilty of contributory negligence, and the liability of the carrier for injuries suffered by him is no different from what it would be if he had been injured while riding in the portion of the train provided for the carriage of passengers. *Waterman v. C. & A. R. Co.* 82 Wis. 613, 634, 52 N. W. 247, 1136.

A contract limiting the liability of the carrier to $500 for injuries sustained by a party accompanying live stock is void as against public policy, inasmuch as such party is a passenger for hire. *Feldschneider v. C., M. & St. P. R. Co.* 122 Wis. 423, 432, 99 N. W. 1034; *Davis v. C., M. & St. P. R. Co.* 93 Wis. 470, 67 N. W. 16, 1132.

No express contract entitling the plaintiff to ride in the same car with his cow and chickens is shown. It is made a verity by the pleadings that he had paid for his passage on the train, but this does not establish a contract for carriage in a freight car. We hardly think that there is any affirmative evidence showing any actual necessity for the plaintiff to be in the car at the time of the accident. No evidence was offered showing any custom on the part of shippers to ride in

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the car containing their live stock. The case is almost barren of proof showing a contract, a custom, or a necessity which entitled plaintiff to ride in this particular car, and were it not for one or two items of testimony to which we will now allude this judgment could not be sustained.

The evidence of the plaintiff shows that, after the collision occurred, the conductor of the train asked plaintiff if he was all right and could go ahead with the car, to which plaintiff replied that he thought so; that he was permitted to ride in the freight car, without objection or without protest, from Whitehall to East Winona on the defendant's road, and from thence to Keokuk on the Chicago, Burlington & Quincy Railroad, and that he occupied the car on his journey from Saturday morning at 9 o'clock until the following Monday morning. The attitude of the conductor of the train which carried the plaintiff from Whitehall was not consistent with any assumption other than the one that plaintiff was in the car as a matter of right. It was the duty of this conductor to examine the transportation of the plaintiff. He knew that he had been at least slightly injured while in the freight car before his train left Whitehall. If that transportation or the custom of the company did not entitle the plaintiff to ride where the conductor found him and afterwards permitted him to ride, it is fair to assume that he would have requested plaintiff to occupy the portion of the train provided for the accommodation of passengers. It is true the conductor testified that he told plaintiff he could not ride in this car, and that he only permitted him to do so because plaintiff informed him that he wanted to remain in the car awhile and fix things up. The plaintiff denies that the conductor made any suggestion that he should not ride in the freight car, and it is undisputed that he did ride in it until it was switched out of the train at East Winona and thereafter until it reached Keokuk. Under this state of the proof the jury might well infer that the contract of carriage was in harmony with the conduct of the parties

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thereunder, and that the construction placed thereon by the parties was in accordance with its terms.

The testimony of the plaintiff further shows that he saw and talked with the brakeman of the freight crew while the car was being put in place by the freight engine preparatory to being coupled to the west-bound train, and that the brakeman asked him if everything was all right as they were about to hitch on. This evidence was disputed, and it was for the jury to determine the fact. The brakeman testified that he had orders from the agent to switch the car containing *Mr. Leasum* onto the west-bound train and that he did switch it onto that train. He watched the brakeman of the west-bound train couple the car onto the engine hauling such train. Having been instructed by the agent to switch the car in question onto the west-bound train, and having apparently superintended such work, the inference is well-nigh conclusive that he gave the engineer and brakeman of such train to understand that the car was ready to be moved in the condition it was with the plaintiff therein. No request was made of the plaintiff to vacate the car. It may well be, as contended by appellant, that a brakeman cannot ordinarily waive the rules adopted by his employer regarding the carriage of passengers, and that notice to him of a fact or condition may not always be notice to his principal. But it is apparent that it was his duty in this case to ascertain whether the car in question was in proper condition to be switched, and, if it was, to move it. Otherwise it was apparently his duty to let it remain where it was. Having ascertained that the plaintiff was in the car with his goods and live stock, it was a question for the jury to say whether the conduct of the defendant's employees was such that plaintiff was justified in inferring that he was rightly in the car. We conclude that there was sufficient evidence in the record to sustain the findings of the jury to the effect that the plaintiff was not guilty of contributory negligence.

By the Court.—Judgment affirmed

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BRATZ, Appellant, vs. STARK, Respondent.

March 9—March 30, 1909.

Negligence: Fires: Evidence: Special verdict: Omissions: Waiver.

1. In an action for damages on account of a fire alleged to have been negligently started by defendant on his own land and negligently allowed to escape onto plaintiff's adjoining land, the evidence is *held* to sustain a verdict finding that the fire was not caused by defendant's negligence.
2. A special verdict in such case finding that the fire which started on defendant's lands and burned over the lands of the plaintiff was not caused by negligence of the defendant, is *held* to have covered the question whether that fire started by reason of any negligence of defendant in starting or guarding certain brush pile fires from which it was claimed the fire in question originated; and, the evidence being undisputed and conclusive that after that fire was discovered no efforts would have availed to prevent its spread to plaintiff's land, it was not necessary to submit that question to the jury.
3. Under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), omission to submit any controverted question in the special verdict is not ground for reversal if there was no specific request for such submission. A finding thereon in conformity with the judgment will be presumed to have been made by the court, and if the evidence is sufficient to sustain such finding it will not be disturbed.

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action for damages alleged to have resulted from a fire negligently started by defendant on his own premises and negligently allowed to escape unto the plaintiff's timber land lying to the east of him. The evidence disclosed, without much dispute, that about 1:30 or 2 o'clock a forest fire was discovered upon a forty acres belonging to defendant, covered with a growth of brush and small timber. The fire ran over certain of plaintiff's premises lying to the eastward and caused damage thereto. It appeared that defendant owned other land immediately south of that upon which the fire started,

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that the same had been cleared from brush and the brush gathered into piles, and that the morning of the same day defendant had burned eight of these piles of brush. He testified that he had continued his attendance on them from 7 a. m. till noon, long after they were burned to ashes, and that no fire escaped from them to the place where the forest fire was found, which was about twenty-five rods from the nearest of these piles. Much evidence was given as to meteorological conditions and as to the precautions exercised by defendant.

The court submitted to the jury a special verdict, of which but one question was answered, and that in the negative, to wit: "Was the fire that started on defendant's lands on May 18, 1907, and which burned over the lands of the plaintiff, caused by negligence of the defendant?" The court instructed the jury to consider, in response to this question, both whether defendant was negligent in causing the fire or in permitting the fire to escape into the adjoining woods, and that they should answer affirmatively if they found negligence in either respect. After motions to reverse the answer to this question and for a new trial, judgment was entered in favor of the defendant, from which the plaintiff appeals.

G. M. Perry, for the appellant.

Thorwald P. Abel, for the respondent.

DODGE, J. The only error which is both assigned and argued by appellant consists in permitting the verdict to stand in defiance of asserted uncontradicted evidence that defendant negligently caused the fire which damaged plaintiff. For convenience we will refer to the fires started by the defendant in the morning to burn his brush as the "brush pile fires," and to that which originated in the afternoon in the woods on defendant's land as the "woods fire." There was no direct evidence how the latter started. It is argued that the proximity of the brush pile fires was such that an inference must be

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drawn that either those fires escaped and ran into the woods or that the high wind blew sparks or brands. There is evidence which, if credited, fully negatives the former theory, and there is evidence that defendant stayed with the brush pile fires until they had entirely burned out, leaving not until nearly noon. There is also evidence that defendant did nothing else to in any way cause the woods fire. So that we think there was evidence at least sufficient to warrant the jury in absolving defendant from any responsibility for the starting of the woods fire, whether by negligence or otherwise. As to any negligence in permitting the woods fire to escape eastward unto plaintiff's land, the evidence is undisputed that at the time it was discovered it was raging before a high westerly wind, with such vehemence that no human efforts could have stayed its progress to the leeward, and that it would have been not only futile but foolhardy to make any efforts in the face of that fire. Such evidence was clearly sufficient to at least make a jury question whether defendant was guilty of negligence in not making such attempt. Apart from such omission there is no suggestion of negligence. This assignment of error cannot be sustained.

There is some argument, though no assignment of error, that the verdict does not cover the issues, since the one answered question of the special verdict does not inquire as to defendant's negligence in permitting fire to escape after it had been started. We have no doubt that the question in the verdict refers to the woods fire, since that was the one that escaped unto and injured plaintiff's land. Therefore inquiry as to whether that fire was caused by defendant's negligence did submit the question whether any negligence of his, either in starting or in guarding the brush pile fires, was responsible for originating the woods fire; and the court very clearly instructed the jury to so consider the evidence in answering the question submitted. After the woods fire started and was discovered, the evidence is undisputed and conclusive that no

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precautions could have been taken or efforts made of any effect to prevent its escape unto plaintiff's lands, and not without unreasonable danger to the life of any person so undertaking. Hence there was no occasion to submit that question to the jury. In any event, the failure to submit it, even in the presence of conflicting evidence, in the absence of a special request by appellant, need not reverse the judgment; for, even if the evidence is not conclusive, it is sufficient to support a finding by the trial court that there was no negligence in permitting the escape of that fire, which finding must be deemed to have been made in obedience to ch. 346, Laws of 1907 (sec. 2858*m*, Stats.)

Certain other assignments of error are not argued and therefore need not be here considered.

By the Court.—Judgment affirmed.

ESTATE OF MOORE: MOORE and another, Appellants, vs. MOORE, Respondent.

March 9—March 30, 1909.

Wills: Construction: Codicil: Cutting down gift in prior provision: Precatory words: Costs.

1. A will gave to the testator's widow and his two sons, each a one-third interest in the residue of the estate. A codicil provided that one son "buy out and pay off the others to the extent of their shares so that" he "will be the owner of the home farm which I [testator] value at about $6,000." *Held*, that the codicil did not cut down the gift first made, but was precatory only.
2. A provision of a will is not to be so construed as to cut down a gift made in positive and clear terms in a prior provision unless it does so by the use of words definite in meaning and in positive terms expressive of such an intent.
3. Generally, in a contest between legatees to establish their rights under a will, costs should be awarded to the successful party.

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APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Affirmed.*

After making certain bequests, concerning which no question is raised, the will in question provided as follows:

"Third. I direct that all the rest, residue of my estate, both real and personal, be divided into three equal parts, and to my beloved wife, *Janie,* I deliver, devise and bequeath one part, to be in lieu of dower and all allowances provided by law for the widow, and in lieu of homestead, and to be her property absolutely and in fee.

"Fourth. I devise to my beloved sons, *John Moore* and *Elmer Moore,* each the one-third part of my estate; it being my intention that after the bequests made in the first and second paragraphs above, that the residue of my estate be divided equally between my beloved wife, *Janie,* and sons, *John* and *Elmer,* each to have one third thereof."

By a codicil the testator provided as follows:

"I hereby devise and give to Mrs. Alice McFarland $500.00 (five hundred dollars) out of the part of my property that my will directed should go to *John Moore* (*i. e.* out of *John Moore's* share)."

A second codicil is as follows:

"I, James Moore, of Stark, while in sound mind and memory, hereby further provide (concerning the fourth paragraph of my will of July 17th, which is altered by a codicil of December 4th by a $500 gift to Mrs. Alice McFarland which I wish to stand) that my son, *Elmer Moore,* buy out and pay off the others to the extent of their shares so that *Elmer* will be the owner of the home farm which I value at about $6,000."

The county court for Vernon county construed the will and codicils as giving the residue of the estate to *Elmer* upon condition that he pay the widow, *Janie Moore,* one third of its value (found to be $1,566.66), and a similar amount, less the legacy of $500 to Mrs. Alice McFarland, to *John Moore.* Upon *John Moore's* appeal to the circuit court the judgment of the county court was reversed and the county court was

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directed to assign the residue of the estate to *Janie Moore, Elmer Moore,* and *John Moore* in common. This is an appeal by *Mrs. Janie Moore* and *Elmer Moore* from the judgment of the circuit court so rendered.

The cause was submitted for the appellants on the brief of *J. Henry Bennett,* and for the respondent on that of *C. W. Graves.*

SIEBECKER, J. The effect of the second codicil in connection with the third and fourth paragraphs of the will is in dispute between the parties. After making some specific bequests, the testator in the third and fourth paragraphs directed that the residue of his estate should be divided into three parts. One part he devised to his wife, in lieu of dower, homestead rights, and allowances to her as widow; the remaining two parts he devised to his two sons, *John* and *Elmer,* "each the one-third part of my estate," expressly declaring, "it being my intention . . . that the residue of my estate be divided equally between my beloved wife, *Janie,* and sons, *John* and *Elmer,* each to have one third thereof." Under these provisions it is clear that the wife and the two sons each obtained a fee interest to a one-third part of the residue of the estate. In the second codicil the testator declares: "I . . . hereby further provide . . . that my son, *Elmer Moore,* buy out and pay off the others to the extent of their shares so that *Elmer* will be the owner of the home farm which I value at about $6,000." The county court held that the testator thereby intended so to modify the will as to give *Elmer* the right to buy the whole interest in the farm, which was included in the residue of the estate under the third and fourth clauses of the will, thereby to impose on *Elmer* the burden of paying the widow and *John* each the one third of its actual value, and by such payment to secure the right to have their interests conveyed to him. The circuit court rejected this view upon the ground that the context of the second codicil

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showed no intent in the testator to abrogate or restrict the interest in the residue of his estate devised to his widow and son *John* as specified in paragraphs 3 and 4, except as the first codicil concededly modified the will.

The latter view seems to us to express the true intent of the testator. The context of the codicil makes it apparent that he had in mind the provisions in paragraphs 3 and 4 which gave his wife and son *John* each a one-third interest in the farm, as he declared, "absolutely and in fee." The language of the codicil is: "that my son, *Elmer Moore,* buy out and pay off the others to the extent of their shares so that *Elmer* will be the owner of the home farm which I value at about $6,000." This clearly evinces that, when he made this codicil, he intended that the widow and each son should each receive and have a one-third interest in the farm, but that he desired *Elmer* to buy out the interests of the others. It is therefore apparent that *Elmer* did not receive the farm under the will, but only a one-third interest therein, as did the other devisees. This idea of the testator necessarily negatives the claim that he intended to devise to *Elmer* the whole farm, but charged with the burden of devises to the widow and the other son, each of one third of its actual value.

If the testator intended that the whole farm should go to *Elmer* under the will he could readily, and naturally would, have employed language which would have expressed such an intention. The phraseology employed is not expressive of such an object, but it evinces a desire that *Elmer* buy out and purchase from the wife and other son the interest in the farm devised to them. This in effect renders the words precatory in their nature, and they are operative only as a recommendation by the testator to his devisees, but they leave compliance discretionary with the parties.

It is furthermore to be observed that the testator fixed no definite value on the farm in case *Elmer* should buy out the others, leaving it to the parties to place a value on it in the

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event of such purchase. The provisions of the will show that the testator understood that all should have the same interest in and right to the land. This gave them mutual and equal rights. *Tabor v. Tabor,* 85 Wis. 313, 55 N. W. 702; *Conlin v. Sowards,* 129 Wis. 320, 109 N. W. 91. The terms of the codicil, when considered in connection with the devises under paragraphs 3 and 4, fail to cut down the gifts made in these paragraphs. It is a well-recognized rule that language in a provision of a will is not to be so construed as to cut down a gift made in positive and clear terms in a prior provision, unless it does so by the use of words definite in meaning and in positive terms expressive of such an intent. The phraseology of the codicil does not meet this requirement. The language employed does not embody the idea that the testator intended to cut down or restrict the interest in the farm given his widow and son *John* in paragraphs 3 and 4. *Estate of Bellas,* 176 Pa. St. 122, 34 Atl. 1003; *Clay v. Wood,* 153 N. Y. 134, 47 N. E. 274; *Bills v. Bills,* 80 Iowa, 269, 45 N. W. 748; *Estate of Granniss,* 142 Cal. 1, 75 Pac. 324. We are of opinion that the circuit court properly held that under the will the widow and the two sons took the farm in common and that each owned one third thereof absolutely in fee.

Respecting the allowance of costs, the record discloses nothing to distinguish this case from the usual contest between legatees to litigate and establish rights to a testator's property under the provisions of a will. There is nothing in the nature of this contest which calls for exempting the litigants from the rules applicable to and governing the right to costs. The circuit court properly awarded costs to the successful party.

By the Court.—Judgment affirmed.

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MAXWELL, Respondent, vs. TOWN OF WELLINGTON, imp., Appellant.

March 9—March 30, 1909.

Highways: Insufficiency: Personal injury: Location of defect: Amendment of complaint: Special verdict: Instructions to jury: Ground of action: Negligence: Remarks of court: Immaterial errors.

1. In an action against two towns for injuries alleged to have been caused by a defect in an *east and west highway*, the stone constituting the defect was alleged to have been on the north and south town line between the towns. On the trial it appeared that such stone was about eighteen inches west of the town line, wholly within one town, and a nonsuit was granted as to the eastern town. It appeared also that the stone was within the limits of a north and south highway, wholly within the western town, at the point where it was intersected by the east and west road. *Held*, that it was not error to permit the complaint to be amended, after plaintiff had rested, so as to describe the defect as being in the *north and south highway* at the intersection of the east and west road, and to admit further evidence as to the location and condition of such north and south highway.
2. It was immaterial in such case whether plaintiff was traveling along or across the defective highway.
3. A question in the special verdict, "Was the highway at the place where and time when plaintiff was injured insufficient for public use?" is *held* to have fairly submitted the issues, so that it was not error to refuse to submit the question, "Was the road running north and south, where the same intersects the east and west road, insufficient for public travel?" although it was claimed that the defect was at a considerable distance from the north and south traveled track.
4. An instruction, relative to admissions testified to as having been made by certain of plaintiff's witnesses at the time of the accident, to the effect that such admissions are considered in law as the weakest kind of evidence, is *held*, even if not giving fully the law on the subject, not to have been prejudicial to defendant. If more specific instructions were desired by defendant they should have been requested.
5. There being evidence that the stone constituting the alleged defect was near the east line of the north and south road, but in

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such close proximity to the traveled track at the point of intersection with the east and west road as to constitute a defect in the highway at such intersection, an instruction stating that "notwithstanding a road may contain a smooth traveled track of sufficient width, still, if there is an obstruction or declivity so close to the traveled track as to render the road or highway unsafe for those traveling thereon in the exercise of ordinary care, the highway may be insufficient," is *held*, though not entirely clear, not to have been harmful.

6. An instruction that the action is based upon negligence of the town authorities in failing to lay out, open, and keep in repair the highway so as to render it reasonably safe for travel, and that the jury were to determine under all the evidence whether such insufficient condition was not only negligence on the part of the defendant town, but also whether such condition was the proximate cause of plaintiff's injury, is *held* not to have been prejudicial to the defendant, although not strictly a correct statement of the law, in that the liability of the town does not rest upon its negligence but upon the statute declaring it liable if the damage happens by reason of insufficiency of the highway. MARSHALL, J., is of the opinion that, inasmuch as the action is not founded upon insufficiency of the highway as originally constructed but upon failure to keep it in repair, it was strictly correct, under the decisions of this court, to say that the action was based on negligence.

7. Language of the trial court, after giving instructions requested by the parties, "Now, I will come back to my own instructions," is disapproved but *held* not prejudicial error.

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This action was brought against the towns of *Wellington* and Glendale, in Monroe county, Wisconsin, to recover damages alleged to have been sustained by the plaintiff on account of a defective highway. The action is predicated upon the alleged negligence of the towns in permitting a stone to remain in the highway, thus rendering such highway defective and insufficient. Upon the trial a motion for nonsuit was granted in favor of the town of Glendale, the evidence showing that the defect in the highway was wholly within the town of

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Wellington. Upon the trial the jury returned the following verdict:

"(1) Was the place where the accident happened within the limits of the town of *Wellington*? *A.* Yes.

"(2) Was the highway at the place where and time when plaintiff was injured insufficient for public use? *A.* Yes.

"(3) If you answer 'Yes' to the second question, did the defendant town have notice of such insufficiency, so that by the exercise of reasonable diligence it might have remedied it before the plaintiff was injured? *A.* Yes.

"(4) If you answer 'Yes' to the second and third questions, was such insufficient condition of the highway the proximate cause of plaintiff's injury? *A.* Yes.

"(5) Was plaintiff guilty of want of ordinary care which contributed to produce her injury? *A.* No.

"(6) Was Mr. Maxwell, the husband of this plaintiff, at the time of the accident to plaintiff, guilty of want of ordinary care which contributed to produce her injury? *A.* No.

"(7) In the event that the court shall finally determine that the plaintiff is entitled to recover, at what sum do you assess her damages? *A.* $725."

Motion for a new trial was made by the defendant and denied, and judgment for plaintiff ordered upon the verdict. Judgment was rendered accordingly, from which this appeal was taken.

Defendant assigns the following errors: (1) The court erred in refusing to submit to the jury in the special verdict the questions proposed by the appellant. (2) The court erred in permitting the plaintiff to amend her complaint on the trial. (3) The court erred in instructing the jury as appears by the first, second, third, and fourth exceptions of the defendant to the charge. (4) The court erred in admitting and excluding testimony against the objections of the defendant.

For the appellant there was a brief by *C. W. Graves,* attorney, and *Masters, Graves & Masters,* of counsel, and oral argument by *C. W. Graves.*

For the respondent there was a brief by *Graham & Graham,* and oral argument by *J. G. Graham.*

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KERWIN, J. It is first insisted that the court erred in permitting the complaint to be amended and in allowing further evidence after plaintiff had rested. In the original complaint and notice the defect and place of injury were described as upon the highway leading from Kendall to Wilton. This highway at or near the place of accident runs east and west. It was claimed that the stone constituting the defect was on the north and south town line separating the towns of Glendale and *Wellington* and in the highway. Both towns were therefore charged with liability and sued jointly. On the trial it appeared from the evidence that in fact the stone was located about eighteen inches west of the town line in the town of *Wellington.* It further appeared from the evidence that this east and west highway formerly deviated to the northwest and struck the four corners of the towns of Glendale, *Wellington,* Clifton, and Wilton, and passed into the town of Wilton, and only touched the corner of the town of *Wellington.* Afterwards, by reason of washouts, a part of this road was abandoned and a new road constructed, so that it hit the town line between Wilton and *Wellington* several rods west of the four corners. This east and west road at the point of the accident intersected the north and south public highway in the town of *Wellington,* so that the stone in question causing the defect was in the north and south highway in the town of *Wellington,* and at a point where it was intersected by the east and west road constructed after the abandonment of the part of the old Wilton road before referred to. The new road connecting with the north and south highway in the town of *Wellington* was a narrow road or dugway, so called, and struck the north and south highway in the town of *Wellington* at the point where the stone in question was situate, and crossed at such point of intersection by the so-called Kendall and Wilton highway in the town of *Wellington* and on the north and south public highway, which the town of *Wellington* was bound to keep in repair. The change in the complaint

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by the amendment was to describe the defect in the north and south highway at a point where the east and west road intersects said north and south road, but did not in fact change the location of the defect. The amendment was objected to and the objection first sustained, but subsequently the court allowed it and permitted further evidence to be offered after plaintiff rested.

There seems to be no doubt under the evidence but that the defect was in the north and south highway in the town of *Wellington* and at the point where said highway was intersected by the east and west road described in the complaint as originally drawn. So it seems plain that there was no error in allowing the amendment, nor in reopening the case for the purpose of allowing further evidence as to the location and condition of the north and south road. It is said by counsel for appellant that the amendment changed the cause of action in the midst of the trial, because the complaint as first drawn and the notice charged defect in one highway while the complaint as amended charged defect in another and wholly different highway which under the evidence was not defective and along which plaintiff was not traveling at the time of injury. Whether plaintiff was traveling along or across the defective highway is wholly immaterial. The highway in which the defect existed was wholly within the town of *Wellington,* as found by the jury. Upon the evidence in the case the jury was justified in finding the north and south highway located in the town of *Wellington* defective.

At the close of the testimony defendant requested the court to submit to the jury as part of the special verdict the following question: "Was the road running north and south, where the same intersects the east and west road, insufficient for public travel?" This was refused and this ruling is complained of, and it is insisted that the court failed to submit any question on this issue. This argument seems to be based upon the idea that because the stone was a considerable dis-

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tance from the traveled track in going north and south on the road, there was no defect, although the highway might be defective at the crossing of the east and west road where the east and west road passed over the town line into the public highway in the town of *Wellington*. The court submitted to the jury the question whether the highway at the place where and time when plaintiff was injured was sufficient for public use. This, we think, fairly submitted the issuable facts to the jury. But counsel says there were two highways involved—one the dugway and the other the north and south road. The jury, however, had only to deal with the highway within the limits of the town of *Wellington* at this point and not the dugway road in the adjoining town. There is no doubt whatever upon the evidence but that the stone which constituted the defect was well within the north and south highway, and the issuable facts upon this point were whether such highway was insufficient for public use and whether it was within the limits of the town of *Wellington*.

It is also contended that the court erred in its instructions to the jury. Two brothers of plaintiff, Alex and John Henry, were in charge of teams traveling along the road in question just ahead of the team plaintiff was driving and were present at the time of the injury. Two other parties, Grant and Saxby, appeared immediately after the injury. They testified to the effect that the Henry boys, or one of them, stated shortly after the accident that the chain which locked the wheel broke when plaintiff was coming down the hill and before the wheel struck the stone. Upon this subject the court charged as follows:

"The defendant in this case has offered some two, possibly more, witnesses—Mr. Saxby and Mr. Grant I particularly refer to—you will remember who the witnesses were—as to certain admissions or statements alleged by the defendant to have been made by one or more of the plaintiff's witnesses, and particularly, I think, by the Henry boys, Aleck and John. You will remember who they are, and you will also remember the statements or admissions or declarations made by them, if

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any, to the said Saxby and Grant. Those statements are alleged—some of them at least—to have been made to the said Saxby and Grant concerning some matters as to the manner in which the accident is said to have occurred on the part of these witnesses, the Henry boys. Now, it is laid down in the books of law that the admissions of parties or witnesses are always admissible, but such admissions, declarations, or statements so made are considered the weakest kind of testimony that can be produced. The reason or some of the reasons for terming it the weakest kind of evidence is this: That a person who has testified on the stand to admissions, statements, or declarations made by some other party to him may not have been thoroughly understood at the time they were made. He may not have fully understood just what some of the declarations or admissions referred to after a lapse of a year and a half or so. He may have forgotten some, even if he did understand them at the time, and from such considerations the law has placed upon such admissions, although permissible to be given and to be considered by the jury for what they are worth,—the law terms them as the weakest kind of evidence."

In the first place, the admissions were not the admissions of plaintiff, and it is at least doubtful from the evidence whether she understood or assented to them. She was suffering from the injury at the time they were made, and a part of the time was unconscious. In order to charge her with responsibility for such admissions she must at least have heard, understood, and assented to them, either expressly or impliedly. This is by no means clear from the evidence. We think the charge was not prejudicial, and sufficiently favorable to the defendant under the evidence. The main complaint against it is that it was not sufficiently specific, in that, while the court told the jury that such admissions are the "weakest kind of evidence," still they were not given "all the law on the subject" and told when admissions are strong evidence. But if counsel desired more specific instructions upon the subject he should have requested them. *Murphy v. Martin,* 58 Wis. 276, 16 N. W. 603; *Nash v. Hoxie,* 59 Wis. 384, 388, 18 N. W. 408

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The following instruction is complained of:

"Notwithstanding a road may contain a smooth traveled track of sufficient width, still, if there is an obstruction or declivity so close to the traveled track as to render the road or highway unsafe for those traveling thereon in the exercise of ordinary care, the highway may be insufficient."

There is evidence that the defect in question was near the east line of the north and south road, but in such close proximity to the traveled track at the point of intersection with the east and west road as to constitute a defect at the intersection of the roads and in the highway within the town of *Wellington,* and the obvious purpose of the instruction was to meet this situation. While the instruction was not as clear as it might have been, we think there was no harmful error in it. *Carpenter v. Rolling,* 107 Wis. 559, 83 N. W. 953.

It is insisted that the court erred in the following instruction:

"This action on the part of the plaintiff is based upon the ground of negligence in the failure on the part of the town authorities, whose duty it is to look after the maintenance and repair of its highways, in failing to lay out, open, and keep in repair such highway so as to render it reasonably safe for travel. You are called upon to consider and determine under all the evidence in this case and under this particular question whether or not such insufficient condition was not only negligence on the part of the defendant town, but also whether such insufficient condition of the highway was the proximate cause of plaintiff's injury."

This instruction is complained of because the court submitted the question of proximate cause and also whether the town was guilty of negligence, and it is contended that the question of proximate cause was the only one which might have been properly submitted, and that by the submission two independent issues were required to be found by one answer, and that the only conclusion the jury could come to was that the question of whether the stone was the proximate cause was determined by the existence of negligence of the town. The instruction is subject to criticism. The liability does not rest

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upon negligence of the town, but upon its statutory liability for insufficiency of the highway. The statute creating the liability does not make the liability depend upon the diligence or want of diligence on the part of the town, but declares that the town shall be liable if the damage shall happen by reason of insufficiency or want of repair. *Ward v. Jefferson,* 24 Wis. 342. To tell the jury as the court did that the action was based upon negligence and that they were to determine whether the insufficient condition was negligence on the part of the town and whether such insufficient condition was the proximate cause of the injury was not strictly a correct statement of the law. *Ward v. Jefferson, supra; Fehrman v. Pine River,* 118 Wis. 150, 95 N. W. 105. But we are convinced that the instruction was not prejudicial. It was perhaps more favorable to the defendant than to the plaintiff. It required the jury, in effect, to find not only proximate cause, but negligence as well; while under the general charge and special verdict, in order to find for the plaintiff they were also required to find that the highway was insufficient for public use. Therefore there was no reversible error in the charge.

After completing the instructions requested the court said: "Now, I will come back to my own instructions." This language is claimed to be prejudicial error. This court has had occasion to criticise language similar to the above used by the trial court, but held it not to amount to prejudicial error. *Wysocki v. Wis. Lakes I. & C. Co.* 121 Wis. 96, 98 N. W. 950; *Miller v. State,* 139 Wis. 57, 119 N. W. 850. Such language should not be used by the trial court, but we cannot say it was prejudicial in this case. We find no reversible error in the record.

By the Court.—The judgment of the court below is affirmed.

The following opinion was filed April 9, 1909:

MARSHALL, J. There are parts of the court's opinion with which I cannot agree and which I feel certain would not have

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been allowed to pass with approval had accuracy thereof been so challenged as to have brought the matter definitely to the minds of my brethren.

In order to appreciate what I shall say it must be remembered that this action was not grounded on insufficiency of the highway in its original construction, but on failure, after such construction, to keep the way in a reasonably safe condition. So the jury were asked to pass, first, upon the issue as to insufficiency; second, in case of insufficiency being found, to pass upon the issue as to whether defendant had notice thereof a sufficient length of time before the accident to enable it, prior thereto, to remedy the defect by the exercise of reasonable diligence; and, third, in case of both insufficiency and such notice existing, to pass upon the issue of whether the former was the proximate cause of the accident.

Thus, it will be seen, the accident was not attributed to failure to perform the absolute duty as to original construction, made negligence as matter of law, but to failure to perform the secondary duty as to reasonable diligence to keep the way reasonably safe. That must be kept in mind, since, as we shall see, while in one class of cases proof of insufficiency proves negligence and, in a sense, such situation does not involve any question of ordinary care, in the other, to which this belongs, it does not prove negligence. In the latter there must be satisfactory proof of failure to exercise ordinary care to keep the highway safe, or, in other words, of negligence in the plain, ordinary sense.

Now, as indicated in the court's opinion, when the learned trial judge instructed the jury as to the question of proximate cause, he said:

"This action on the part of the plaintiff is based upon the ground of negligence in the failure on the part of the town authorities, whose duty it is to look after the maintenance and repair of its highways, in failing to lay out, open, and keep in repair such highway so as to render it reasonably safe for travel. You are called upon to consider and determine under

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all the evidence in this case and under this particular question whether or not such insufficient condition was not only negligence on the part of the defendant town, but also whether such insufficient condition of the highway was the proximate cause of plaintiff's injury."

It were better nothing had been said at this point about negligence, because whether there was or was not that element turned on the issue of fact covered by the interrogatory as to insufficiency and the one as to notice. But, plainly, the negligence referred to was failure to exercise reasonable diligence to remedy a created insufficient condition of the highway. It was not spoken of as a matter to be passed upon in answering the question as to proximate cause independently of affirmative findings on the subject of insufficiency and want of proper diligence to repair. Not noting that, as it seems, nor the distinction between insufficiency in original construction and want of subsequent diligence to repair, this language was used in the opinion:

"The instruction is subject to criticism. The liability does not rest upon negligence of the town, but upon its statutory liability for insufficiency of the highway. The statute creating the liability does not make the liability depend upon the diligence or want of diligence on the part of the town, but declares that the town shall be liable if the damage shall happen by reason of insufficiency or want of repair. *Ward v. Jefferson,* 24 Wis. 342. To tell the jury as the court did that the action was based upon negligence and that they were to determine whether the insufficient condition was negligence on the part of the town and whether such insufficient condition was the proximate cause of the injury was not strictly a correct statement of the law. *Ward v. Jefferson, supra; Fehrman v. Pine River,* 118 Wis. 150, 95 N. W. 105. But we are convinced that the instruction was not prejudicial. It was perhaps more favorable to the defendant than to the plaintiff. It required the jury, in effect, to find not only proximate cause, but negligence as well; while under the general charge and special verdict, in order to find for the plaintiff they were

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also required to find that the highway was insufficient for public use. Therefore there was no reversible error in the charge."

Such language is faulty in several respects. There was no general charge and special verdict as to finding for the plaintiff. There were special instructions directed to special questions. Again, the finding that the highway was insufficient did not of itself render the town liable subject to a finding on the subject of proximate cause. There was left the matter of reasonable diligence to repair to which the element of negligence in the instruction referred, necessarily, as covered by the previous question. The jury were not required to pass upon the subject of proximate cause unless they found the want of diligence covered by such previous question, or in other words, found negligence. So the court said, unnecessarily, of course, as the negligence was covered by the previous question,—"Under this question you are to determine not only whether defendant was negligent, but whether such negligence was the proximate cause," etc.

The statement in the opinion, especially as applied to a case like this: the liability does not rest upon diligence or want of diligence of the town, but upon its statutory liability for insufficiency of the highway,—is contrary to what this court has repeatedly said. In support of the declaration the writer of the opinion cited *Ward v. Jefferson,* 24 Wis. 342. It was overlooked that the case holds contrary to the court's present deduction therefrom. It is to the plain effect that while failure to properly make a highway in the first instance is negligence as matter of law, because the duty to do so is absolute, the primary duty having been performed, the secondary one as to keeping the way sufficient involves ordinary care. After referring to such primary duty, DIXON, C. J., said:

"It is nevertheless true, as appears from many of the reported cases, that there may be circumstances in which the question of proper care or diligence on the part of the town may be taken into consideration in determining its liability.

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This happens . . ." where "the question comes up whether the authorities of the town had notice, or sufficient time had elapsed for them, with reasonable diligence, to have acquired knowledge of the insufficiency, and to have put the road in repair, or by other means to have guarded against and prevented the injury."

The learned chief justice went on to say that 'the instances involving want of reasonable care are *exceptions to the liability of towns not expressed in the statute, but depending upon that equitable construction of it given by this court, following decisions in states from which our statute was borrowed.*' After giving several instances of such exceptions the court said:

"Other examples of a less clear and positive character, where, upon the finding of a jury that it [the town] had been guilty of no negligence or want of proper care, the town would be excused, might also be given; but it is deemed unnecessary. Enough has been said to point out, and in some measure define, the class of cases in which the question of exercise of ordinary care or caution on the part of the town arises."

Probably enough has been said to demonstrate that *Ward v. Jefferson, supra,* as before stated, is contrary to the court's present suggestion, but I will reinforce it by subsequent cases of the same sort: *Boltz v. Sullivan,* 101 Wis. 608, 77 N. W. 870; *Peake v. Superior,* 106 Wis. 403, 82 N. W. 306; *Fehrman v. Pine River,* 118 Wis. 150, 95 N. W. 105. The court in the second case cited, speaking by the present chief justice, defined *Ward v. Jefferson, supra,* thus:

"It seems to have been thought by counsel that there has been a change in the position of this court upon this subject since the case of *Ward v. Jefferson,* 24 Wis. 342. That case simply held that, where a highway was defectively constructed by the municipality, the statutory duty never had been performed, and the liability of the municipality for injuries resulting from such defect to travelers exercising ordinary care was absolute. Such a defect being established, the negligence of the town is conclusively proven, and the jury cannot find that ordinary care has been exercised. On the other hand, it

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was said in that case, in substance, that if the highway was originally constructed with reasonable safety, but afterwards became defective by action of the elements or the act of a third person, and a traveler was injured thereby, the question of whether the municipal officials had notice of the defect, or had exercised ordinary and reasonable care and diligence in inspecting the highway and repairing the defect, arises, and must be decided. In other words, the duty to make the street reasonably safe in its original construction is absolute; but the duty to discover and repair defects afterwards occurring, not by acts of the municipality, is one involving only ordinary and reasonable care and diligence. This latter duty may properly be called the duty to exercise ordinary care, if the term 'ordinary care' be properly defined."

Later, in the last case cited, the court said the doctrine that the duty of a town to keep its highways reasonably safe is "not to be measured by the rule of reasonable diligence," has no application to a case of this sort. Following the logic of our decisions, in the main, and overruling some expressions in exceptional cases out of harmony therewith, the court held that proximate cause involving the element of negligence is as essential to a recovery under sec. 1339, Stats. (1898), as in any ordinary action based on negligence. Negligence of the town, however, as before indicated, in a case involving insufficiency in original construction, depends solely upon whether the highway was reasonably safe.

So I cannot escape the conclusion that—to tell the jury, as the trial court did, that the action was based upon negligence and that they were to determine whether the insufficient condition was negligence on the part of the town, and whether such insufficient condition was the proximate cause of the injury, was strictly correct. The only difficulty with the instruction is in that the jury should not have been told they were to pass on the issue of negligence in answering the question as to proximate cause. That was passed upon in answering the previous question. However, the inaccuracy was harmless. Proximate cause was found, necessarily, under the

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fourth question, and liability subject thereto was found, not by the finding of insufficiency, in answer to the second question, but by that and the finding of failure to exercise ordinary care, the negligence upon which the case was grounded, in answer to the third question.

Remington Drainage District: Appeal of Chandos.

March 9—March 30, 1909.

Drains: Validity of drainage laws: Statute construed: Provisions for new assessment of benefits: Pleading: Demurrer.

1. The drainage laws can be sustained only by reason of the public nature of the enterprise and the actual benefits accruing to the persons taxed.
2. Sec. 10, ch. 419, Laws of 1905 (sec. 1379—20, Stats.: Supp. 1906), does not, in view of other provisions of the chapter, authorize a new assessment of benefits by supplemental report or petition of the drainage commissioners, but relates merely to the correction of insubstantial errors in the proceedings not going to jurisdiction over the subject matter.

[3. Whether the first assessment of benefits in drainage proceedings is final and conclusive for all time, except as qualified by sec. 39, ch. 419, Laws of 1905 (sec. 1379—31*r*, Stats.: Supp. 1906), and whether said sec. 39 is valid, not determined.]

4. A demurrer to the remonstrance against the granting of a petition in drainage proceedings relates back to the petition and raises the question of its sufficiency.

Appeal from an order of the circuit court for Wood county: Chas. M. Webb, Circuit Judge. *Reversed.*

The appeal is from an order sustaining a demurrer to the remonstrance of the appellant, *Chandos.*

The cause was submitted for the appellant on the brief of *H. I. Gardner,* and for the respondents on that of *John A. Gaynor* and *B. M. Vaughan.*

Among other references upon the part of the appellant

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were the following: 10 Am. & Eng. Ency. of Law (2d ed.) 253, 255; *Stone v. Little Yellow D. Dist.* 118 Wis. 388, 95 N. W. 405; 23 Cyc. 861; *Van Dresar v. Coyle,* 38 Wis. 672; *Pier v. Storm,* 37 Wis. 247; *Egan v. Sengpiel,* 46 Wis. 703, 1 N. W. 467; *Main v. McLaughlin,* 78 Wis. 449, 47 N. W. 938.

TIMLIN, J. Drainage commissioners appointed under sec. 1379—11 *et seq.,* Stats. (1898), had their amended and final report confirmed by the circuit court as provided by these statutes on September 2, 1902. They made on September 1, 1904, an additional assessment under sec. 1379—24, to complete the construction, and on October 23, 1907, filed a supplemental report substantially to the effect that when the report confirmed September 2, 1902, was made it was thought that the ditches therein described would be of sufficient depth and capacity to drain the land, but experience had shown they were not so; that, in order to give good and sufficient agricultural drainage to the lands in the district and permit the maintenance of good roads therein, certain specified drains should be deepened and widened as indicated. The cost of this enlargement of drains was reported at $28,623.31. This drainage district since its original formation had been enlarged by addition of certain lands, and it was further reported that the benefits accruing to the original drainage district as it existed before enlargement from this widening and deepening of drains would be $406,737.76, and in proportion to the benefits theretofore reported to the court and confirmed by the order of September 2, 1902; that this work should be paid for by the original district for reasons given, and the public health and welfare would be greatly promoted, etc. A list of assessments of the estimated cost of construction against lands reported to be benefited is part of the petition, and the prayer of the petition is that the former order of confirmation dated September 2, 1902, be revised, modified,

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and changed so that it confirms the reported benefits of $406,737.76, confirms the specifications for the enlarged drains, and confirms the said assessment of the cost of enlargement upon the lands and lots reported.

The appellant met this petition with a remonstrance averring that he was a landowner affected by the proposed action and showing how; that the original assessment for benefits and maintenance confirmed September 2, 1902, was for $62,831.46 and no more; that of this sum there was assessed for collection September 2, 1902, and confirmed by order of that date, $31,465.73, and by the second assessment of September 1, 1904, $7,642.48, making $39,109.21, which together with the $28,623.31 now proposed to be assessed would exceed by $4,901.06 the entire benefits first found, assessed, and confirmed by the court order of September 2, 1902. This idea is presented in several different ways in the remonstrance, and it is further averred that the order of September 2, 1902, is in force and the matters adjudicated and conclusively fixed for all time.

The petitioners demurred to this remonstrance and their demurrer was sustained, and the case is before us upon appeal from the order sustaining the demurrer and striking out the remonstrance.

One might, perhaps, be readily excused for not thoroughly understanding these drainage statutes. The provisions thereof are loosely worded, the plan complicated, and the statutes drafted as if there were no limitations upon the power of the legislature in this respect. We have given the questions involved in this appeal careful study. It is only by keeping constantly in mind that these statutes can be upheld by reason of the public nature of the enterprise in fact and the actual benefits in fact accruing to the persons taxed, and not otherwise, that we are enabled to obtain any just notion of the proper interpretation of the statute. These facts may be established beyond contradiction or denial by a ju-

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dicial proceeding going upon notice and hearing as against a party to such judicial proceeding. Otherwise they would be open to controversy in every direct contest involving the right to assess or collect assessments. We need not here pass upon the validity of a statute which sought to make a judgment or order conclusive upon one of the parties litigant and not conclusive upon the other, because that question cannot arise until we first find that the legislature has really attempted to do such a thing. The commissioners base their right or claim to carry out this proceeding largely, if not altogether, upon the following provisions of statute:

"All drainage districts heretofore organized under sections of law hereby repealed shall, after the passage hereof, be governed by this act." Sec. 35, ch. 419, Laws of 1905.

"At any time prior to making the order confirming said report or thereafter, the court may permit the commissioners to present and file a supplemental report, or amend their report, as to any matter which, pursuant to the provisions hereof, was or might have been included in the original report presented by them, and after reasonable notice given to all parties interested, in such manner as the court shall direct, the court may upon the hearing in said matter make such order as the case may require." Sec. 10.

These provisions standing alone are very broad and sweeping. But they do not stand alone in the act. There is in the same section:

(1) "The order of confirmation shall be final and conclusive, the proposed work shall be established and authorized, and the proposed assessments approved and confirmed unless within thirty days an appeal be taken to the supreme court."

(2) There is in the sixth subdivision of sec. 1, and in the seventh subdivision of sec. 8, language tending strongly to show that the enlargement of a drain is a matter to be presented and passed upon by original petition of the landowners.

(3) There is after the initial petition by the landowners and after the second report of the commissioners an assessment of benefits provided for based upon such second report,

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and separate and distinct from the assessment for cost of construction. The latter assessment is again subdivided into an assessment against tracts, lots, and corporations specially benefited, and the remainder of the cost of construction as there defined is then assessed against the several benefited tracts, lots, and easements in proportion to the benefits which they have assessed against the same. Secs. 8, 9, 10. Here are three different kinds of assessments provided for: First, an assessment of benefits; second, assessment of costs of construction divided into two, namely, one according to special benefits and the other according to benefits.

(4) The only authority found in this statute for any assessment of any kind after the first is as follows: First. In sec. 20, which is limited to two cases: (a) Where in the first assessment for construction (not assessment of benefits) the commissioners shall have reported to the court a smaller sum than is needed to complete the work of construction; (b) where an additional sum is needed to pay the interest on lawful indebtedness of said drainage district. In these cases the assessments shall be based on the last "assessment of benefits." Second. In sec. 13, which provides for annual assessments to keep up repairs, which shall be apportioned on the last assessment of benefits. This must be read with sec. 8, which requires the commissioners in their second report to report the probable cost of keeping in repair. Third. In sec. 39, which provides for a new assessment of benefits upon the following conditions: (a) Five years must have elapsed since the confirmation of the second report of the commissioners under the new statute, report of commissioners under the old statute; (b) there must be a petition by a stated fraction of the owners of lands within the district; (c) the petition shall contain the required averments; (d) the reassessment of benefits shall be reported to the court, and there must be notice to the parties affected, a hearing, and an order of confirmation.

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In the face of these provisions of the statute it cannot be held that under the quoted paragraph from sec. 10 the commissioners may make a new assessment of benefits unless we are to reverse the ordinary rule of construction and hold that vague generalities override specific provisions relating to a particular subject matter. There are other considerations which forbid the construction placed upon this statute by the court below.

In organizing a district for the purpose of enlarging, repairing, or maintaining a drain, ditch, or levee there may be damages as well as benefits. Secs. 1, 8, ch. 419, Laws of 1905. The proceeding to enlarge must be dismissed unless the aggregate cost is less than the amount of benefits. Secs. 8, 9, 10. The assessment cannot be based upon any assessment of benefits made for any other purpose or with any other object in view, but must be with reference to the benefits accruing to the land by enlarging the drain. It "shall be apportioned on the actual benefits to the same." Sec. 8. This means the actual benefits from the enlargement of the drain. All other assessments authorized by this chapter after the first assessment are based on the last preceding assessment of benefits (sec. 20), except the assessment authorized by sec. 39, which is based on the actual benefits without reference to whether in the original assessment the lands were assessed for benefits or awarded damages. Sec. 18, relating to the authority of the commissioners, declares they "may do any and all necessary acts in and about the surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any ditch, drain, levee or other work for which they shall have been appointed." These commissioners have not yet been appointed to enlarge these ditches. The last paragraph of sec. 10, under which the commissioners claim authority, must be held to be a statute of *jeofail* relating to the correction of insubstantial errors in the proceedings not going to the jurisdiction over the subject matter, but

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bringing in parties, correcting errors, extending boundaries, and similar details of practice.

Whether the remedy of the drainage district, if it has any, is the institution of a new or independent proceeding, or is under sec. 39, we do not determine. Nor do we pass upon the validity of sec. 39. There are difficulties either way. But we have no doubt the ingenuity of counsel will devise some remedy under this statute if there is a real grievance existing and a remedy possible. We have omitted to decide the question whether or not the first assessment of benefits is final and conclusive for all time, except as qualified by sec. 39, because we do not necessarily reach that question and because the question is a new one and quite inadequately presented upon authority or analogy. But we do decide that, upon a fair construction of this statute, it was not intended by the lawmakers that there could be a new assessment of benefits by supplemental petition of the commissioners proceeding under the last paragraph of sec. 10 of the statute. It follows that the demurrer to the remonstrance should have been carried back to the petition and sustained as a demurrer to the petition under the rule of *State ex rel. Leiser v. Koch, ante,* p. 27, 119 N. W. 839, and cases cited.

By the Court.—The order of the circuit court is reversed, and the cause remanded with directions to sustain the demurrer as a demurrer to the petition, and for further proceedings according to law.

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SMITH, Appellant, vs. BOARD OF TRUSTEES OF THE WISCONSIN VETERANS' HOME, Respondent.

March 9—March 30, 1909.

Corporations: Veterans' Home: Discharge of inmate for misconduct: Security for costs: Discretion.

1. Corporations organized for purposes akin to that for which the Board of Trustees of the Wisconsin Veterans' Home was organized have the right to prescribe reasonable rules governing the admission and discharge of inmates; and under sec. 1785, Stats. (1898), the proper officers may at any time discharge any such inmate when, in their judgment, it shall be for his interests or the interests of the corporation.
2. In an action against said corporation for damages for a wrongful discharge from the Home, it is *held* that a verdict was properly directed for defendant,—it appearing that the board of trustees had proceeded regularly, within its statutory powers, and in accordance with its by-laws, rules, and regulations in discharging plaintiff because of misconduct in circulating false and scandalous reports concerning officials of the Home, to the detriment of the institution.
3. The fact that plaintiff was able to furnish the required security shows that there was no abuse of discretion in an order requiring him to give security for costs; and in the absence of such abuse the order should not be reversed.

APPEAL from a judgment of the circuit court for Waupaca county: JOHN GOODLAND, Judge. *Affirmed.*

The defendant is a corporation organized for the purpose of establishing and carrying on an institution for the maintenance of destitute soldiers and sailors of the late Civil War and their widows. Its articles of incorporation forbid the payment of dividends. Before the corporation began operation the legislature of Wisconsin provided that when the Home was established and put in operation there should be paid by the state treasurer to the treasurer of the board of trustees of said corporation $3 per week for the board of each inmate. Later an appropriation of $50,000 was made for the Home. The amounts paid by the state to the defendant corporation

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aggregate a large sum. As a condition to the appropriation the state required the title to the lands of the Home to be vested in the state, and reserved the right to exercise certain visitatorial powers over the institution. A certain portion of the expense of maintaining the inmates of said Home was paid by the general government of the United States. The by-laws, rules, and regulations adopted for the management of the Home provided that all persons, members in good standing of the Grand Army of the Republic in the Department of Wisconsin and entitled to vote at the annual meeting of the department encampment, should be members of such corporation; that the board of trustees should hear and determine all appeals taken from the decisions of the commandant, and all grievances of members when made in person or in writing; and that where an appeal was taken from any sentence or act of the commandant he should be present at the hearing with the evidence on which his sentence or act was based. It was made the duty of the commandant to keep a docket called "Offenders' Docket," and to keep a complete history of every offense and offender. It was provided that no member should be discharged, suspended, or dealt with in any way without first having a hearing, and for this purpose a time and place was required to be fixed by the commandant at which to hear all complaints each day, and that a brief statement of evidence and witnesses should in each case be recorded. Further, that the commandant should have full power to summarily discharge, after trial, for the following offenses: First, habitual intoxication; second, bringing intoxicating liquors upon the grounds or having the same in possession without permission of the surgeon; third, wilful disobedience of orders of the commandant and insulting, violent, or abusive language to any officer, member, or employee; fourth, scandalizing in any manner the management of the Home. For violation of any of the foregoing rules the commandant was required to notify the offender to appear before him at a time

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fixed for hearing complaints, and if found guilty the commandant was authorized to pass such sentence as he might deem just and proper, subject, however, to an appeal to the board. Any member desiring to appeal from the commandant's sentence might make a written appeal to the board of trustees. It was further provided that any member might be ordered dishonorably or summarily discharged by the board of trustees for wilful violation of rules and regulations governing the Home, and by the commandant in cases provided for in the rules. It was provided that abusive language against the board of trustees or officers of the Home should not be tolerated at any time or at any place, and should subject the offender to dishonorable discharge. Members having grievances or complaints of any kind against the Home were invited to present the same, with the assurance that every effort would be made to remove the grievance complained of, if found to exist. The total membership, as appears from the annual report of 1905, is 700.

The plaintiff was a soldier in the Civil War and was seventy-eight years of age at the time this action was begun. He was admitted to the Home in June, 1901, and remained an inmate until September, 1906, when he was dishonorably discharged. At the time he was admitted he was receiving a pension of $12 a month, and under the rules paid $4 of this to the Home until his marriage in August, 1901. He was a member of the Grand Army of the Republic in the Department of Wisconsin. In 1906 he was sent as a delegate from his Grand Army post to the state encampment at Marinette, and made a protest against the re-election of D. G. James as a member of the board of trustees, asserting that said James was criminally intimate with one Mrs. White, the matron of the Home. The plaintiff industriously circulated the report that said James and said matron were improperly conducting themselves. Plaintiff testified that he did not state that the facts were within his knowledge, but only that it was common

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rumor that criminal intimacy existed between the parties involved. The proof to the effect that the statements were positively made and that plaintiff said he was prepared to prove them is, however, quite convincing. After the encampment was over the plaintiff was called before the board of trustees, at which time he claims he presented a petition asking for an investigation of the rumor concerning the conduct of Mrs. White and Mr. James. The evidence of what took place at said meeting is not fully preserved, and there is considerable conflict in the testimony as to what evidence was in fact produced. The request of the plaintiff for an investigation was denied, if any request was in fact made. It does not appear that at this meeting any evidence was produced which tended to show that the charge made by the plaintiff was in fact true, unless it was given by the witness Drown. At the regular meeting of the board in August a resolution was passed directing the commandant to notify the plaintiff that he must prove the statements made touching the character of officers of the Home and other statements derogatory to the best interests of the Home, and that unless he was able to prove such statements the commandant was directed to dishonorably discharge him from the Home. At a meeting held in September this resolution was rescinded, and it was resolved that the board investigate the statements made by the plaintiff at the aforesaid encampment and also certain statements alleged to have been made at other times since the meeting of the board held on the 9th of July. The plaintiff was called before the board, and all of the witnesses upon whom he relied, with one exception, to testify to the truth of the statements made in reference to Mr. James and Mrs. White were sworn. None of the witnesses gave any testimony tending to incriminate either of the parties, and the plaintiff apparently relied on rumor entirely as the foundation for the charges which he had made. The plaintiff failing to prove his charges he was dishonorably discharged. It also appears that at the September

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meeting of the board he virtually defied the board to prevent him making statements such as he had theretofore made. It also appeared that between the time the encampment was held at Marinette and the date of the discharge of *Smith* from the institution he had persisted in making statements to the effect that there was a criminal intimacy between the parties heretofore named, and stated in substance and effect that the board did not dare discharge him from the institution.

The plaintiff brings this action against the defendant to recover damages for being wrongfully deprived of his home from and after the time he was discharged, and to compensate him for the expense he has already suffered and is likely to suffer in the future. The damages claimed amount to $5,000. At the close of the testimony the trial court directed a verdict for the defendant, and from the judgment entered upon such verdict plaintiff brings this appeal. The errors assigned are as follows: (1) In directing a verdict for the defendant. (2) In excluding the evidence of a certain witness. (3) In requiring plaintiff to file security for costs.

For the appellant there were briefs by *B. E. Van Keuren*, attorney, and *Charles H. Forward*, of counsel, and oral argument by *Mr. Van Keuren*.

For the respondent there was a brief by *Browne, Browne & Fisher*, and oral argument by *E. E. Browne*.

BARNES, J. If the plaintiff had been in possession of facts which reasonably induced the belief in his mind that the trustee, James, and the matron, Mrs. White, were criminally intimate or were guilty of unbecoming conduct, and complaint had been made in the proper manner and to the proper parties, his conduct might be characterized as courageous and commendable. An institution supported by the bounty of the state should be above suspicion in the respect complained of, and its inmates could ill afford to remain silent if reasonably convinced that it was being used to harbor the mistress

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of a member of the governing body of the corporation. Such reprehensible conduct was likely to be discovered sooner or later, and when discovered might well react upon the institution itself, the maintenance of which is a matter of moment to those being cared for. So much is said by way of preface, lest what follows might be erroneously construed as intimating that members of the Wisconsin Veterans' Home must hold their peace on penalty of discharge when it is their duty to speak.

It is apparent from the record that before plaintiff attended the encampment of the Grand Army of the Republic at Marinette in June, 1906, he had heard rumors to the effect that illicit relations were being maintained between Mr. James and Mrs. White, but that he had no actual knowledge that such relations existed, and had nothing more substantial upon which to base his subsequent statements than the floating gossip of idle tongues. He industriously circulated such rumors among the delegates attending the encampment. While he denies, in a way, that he did more than to report the rumors he had heard, the evidence is overwhelming and convincing that he stated as a matter of fact that Mr. James and Mrs. White were guilty and that he could prove his statement by an abundance of witnesses if the opportunity were only afforded him. At the close of the encampment at Marinette he wrote to T. J. Jeffers, an inmate of the Home, that he was satisfied that the rumor he testified he had circulated was "idle camp talk" indulged in "for the purpose of injuring Mrs. W., and that more than anything else," and that he "was dragged into it by a person" he believed he could depend upon as his friend. At the meeting of the board of trustees of the Home in July, 1906, he was called before it, but the evidence is unsatisfactory as to what took place. No full record of the proceedings was preserved, and there is dispute and confusion in the evidence as to what transpired. It does appear that the plaintiff was admonished to discontinue further gos-

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sip, and was told that were it not for his age and physical and mental condition he would be dishonorably discharged. This leniency evidently induced the belief in his mind that the board was afraid to discharge him, and he apparently continued to bruit the rumors he had been cautioned to desist from circulating. When given an opportunity at the September meeting to make good his accusations, he utterly failed to produce any proof that would justify him in persisting in making his charges.

Considering the age, the condition, and the infirmities of the inmates of this Home, it is to be expected that they will be treated with consideration and forbearance. Fault-finding is often a characteristic, if not a prerogative, of the aged and the infirm, and so long as it is not productive of harm it may well be treated as innocuous. But in an institution of this kind, usually containing 600 or 700 inmates, it is self-evident that some discipline must be maintained and that some wholesome restraint must be placed upon the anile tendency of the inmates to garrulity when it means detriment to the institution itself as well as irreparable injury to others. The fault of the plaintiff here was no idle maundering or mere peccadillo, and could not be overlooked by any self-respecting institution.

The defendant is an eleemosynary corporation organized under the laws of Wisconsin. Corporations organized for purposes akin to that for which defendant was organized have the right to prescribe reasonable rules governing the admission of inmates and also have the right to prescribe like rules pertaining to their discharge. Sec. 1785, Stats. (1898), provides that as to such corporations "the proper officers designated by the by-laws may, in their discretion, at any time discharge any such inmate when, in their judgment, it shall be for his interests or the interests of the corporation." The trustees were acting within their statutory powers and in accordance with their by-laws, rules, and regulations in making

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the discharge. They seem to have proceeded regularly and without undue haste in making it, and the circuit court was right in directing a verdict for the defendant. The board was warranted in believing that the conduct of the plaintiff was reprehensible, and that the welfare of the institution demanded that he sever his connection with it.

Mr. James did not vote upon the resolution to discharge the plaintiff, and was not present when it was passed. There was no sufficient showing made to disqualify the other members of the board of trustees from acting because of interest or bias. *State ex rel. Starkweather v. Superior,* 90 Wis. 612, 64 N. W. 304; *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 964.

An order was made in the action requiring the plaintiff to give security for costs, which was complied with. It is urged that the order is erroneous. No exception was taken thereto. No exception need be taken to an order that is properly a part of the judgment roll. Sec. 2872, Stats. (1898). All orders and papers in any way involving the merits, and necessarily affecting the judgment, are properly a part of the judgment roll. Sec. 2898, Stats. (1898). On an appeal from a judgment, any intermediate order which involves the merits, and necessarily affects the judgment, appearing upon the record transmitted, may be reviewed without exception. Sec. 3070, Stats. (1898). It is difficult to see how the order in question either involved the merits of the action or affected the judgment rendered therein, and if it did not it can be reviewed only on exception being taken thereto. *Donkle v. Milem,* 88 Wis. 33, 59 N. W. 586. Had the plaintiff been unable to furnish the required security and had a judgment been entered dismissing his action for that reason, an entirely different question would be presented. The fact that the plaintiff was able to furnish the required security makes it self-evident that there was no abuse of discretion on the part of the trial court in making the order, and

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in the absence of such abuse the order should not be reversed. *Simanek v. Nemetz,* 120 Wis. 42, 97 N. W. 508; *Colbeth v. Colbeth,* 117 Wis. 90, 93 N. W. 829; *Cullen v. Hanisch,* 114 Wis. 24, 89 N. W. 900; *Joint School Dist. v. Kemen,* 72 Wis. 179, 39 N. W. 131; *Heeron v. Beckwith,* 1 Wis. 17.

Some other questions are treated in the briefs, but the conclusion we have reached renders discussion of them unnecessary.

By the Court.—Judgment affirmed.

MEGGETT, Respondent, vs. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY: SMITH and others, Appellants.

March 10—March 30, 1909.

Life insurance: Who may assign policy: Rights of assignee: Exclusion of beneficiaries.

1. A person who obtains insurance on his life and pays the premiums for the benefit of another may assign or dispose of the policy in any manner not inconsistent with its terms, to the exclusion of the beneficiary named therein.
2. A daughter applied for insurance on the life of her father, and was named as beneficiary in the policy, which further provided that in case of her death before the death of her father the insurance should be payable to his heirs at law. Either she or her father paid the premiums. *Held* that, as owners and in control of the policy, the daughter and her father had full power to assign it.
3. The daughter, with the assent of the father, assigned the policy "and all . . . sums of money . . . now due or hereafter to arise or to be had or made by virtue thereof, and subject to all the terms, conditions, and provisions of said policy." *Held,* that such assignment was not restricted to any interest less than all the rights and interest inhering in the contract, and that thereunder the right of the assignee to the policy and its proceeds became absolute and the interest of all persons named therein as beneficiaries ceased.

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APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action to determine the ownership of the proceeds of an insurance policy. On December 13, 1864, the defendant company issued a policy of insurance upon the life of Alexander Meggett. The complaint alleges that Mary H. T. Meggett, a daughter of the insured, paid the first premium. The policy provided that the premiums should be paid in ten annual payments and that the policy should mature at Alexander Meggett's death. October 6, 1873, Mary H. T. Meggett, then a single woman twenty-two years of age, assigned the policy with the consent of her father, the insured, to her stepmother, Sarah A. Meggett. Mary H. T. Meggett afterwards married and died, and at her decease left surviving her three children, who are defendants in this action. Sarah A. Meggett died after Mary H. T. Meggett, and left surviving her her husband, the insured, and two children, the plaintiff and Frank T. Meggett. These were her only heirs at law. Alexander Meggett, after the death of Sarah A. Meggett, assigned the policy of insurance to the plaintiff. Frank T. Meggett and Alexander Meggett as special administrator of the estate of his deceased wife, Sarah A. Meggett, jointly assigned the policy to the plaintiff. At the time of the death of the insured, July 16, 1907, he left surviving him as his only heirs at law the three children of his deceased daughter and his two sons, the children of Sarah A. Meggett, plaintiff and Frank T. Meggett. Frank T. Meggett has assigned any interest or claim he might have in the policy to the plaintiff.

After plaintiff had made proof of death and proved the above facts as establishing his interest in the policy and his right to the proceeds, the defendant company paid plaintiff two thirds of the proceeds of the policy, but refused to pay him the other one third. Plaintiff brought his action, alleging the facts as given above and also that the premiums had

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all been paid. The answer of the defendant company admits the allegations of the complaint except as to proof of plaintiff's interest in and right to the one third of the proceeds of the policy, and requests permission to pay this sum into court and be released. This is an appeal from the order of the court overruling the demurrer of the individual defendants to the complaint on the ground that it did not state a cause of action.

Wm. R. Bagley, for the appellants, contended, *inter alia,* that the mere fact that Alexander Meggett's life was insured by a policy procured by his daughter did not give him the power to assign the policy to the exclusion of the beneficiaries named therein. *Ferdon v. Canfield,* 104 N. Y. 143. The interest of Mary H. T. Meggett as assured was contingent, and her assignment to her stepmother assigned no greater interest. 25 Cyc. 777, note 84; *Conn. Mut. L. Ins. Co. v. Burroughs,* 34 Conn. 305; *Stevens v. Germania L. Ins. Co.* 26 Tex. Civ. App. 156; *Mut. L. Ins. Co. v. Hagerman,* 19 Colo. App. 33; *Appeal of Brown,* 125 Pa. St. 303; *Entwistle v. Travelers Ins. Co.* 202 Pa. St. 141. The assignment by Mary to her stepmother was conditional, being expressly "subject to all the terms, conditions, and provisions of" the policy. One of the conditions of the policy is that the proceeds shall be paid to Mary in case she shall survive her father; and it is provided in the policy that in the event that Mary does not survide her father, the proceeds shall be paid to her father's heirs at law. After the death of Mary the right of the heirs at law of Alexander Meggett to the proceeds of the policy became absolute and indefeasible.

For the respondent there was a brief by *Olin & Butler,* and oral argument by *H. L. Butler.*

SIEBECKER, J. The allegations of the complaint set forth the contract and the assignment by which the rights to the proceeds of the policy are established. It appears therefrom

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that the policy called for the payment of ten annual premiums during the first ten years after its issue and was to mature at the death of Alexander Meggett, the insured. The assignment by Mary to her stepmother, Sarah Meggett, was assented to by the insured, was made October 6, 1873, and was based on a valuable consideration. She thereby "granted, assigned, transferred, and set over . . . unto the said Sarah A. Meggett, her heirs, executors, administrators, and assigns the said policy of assurance, and all . . . sums of money, interest, benefit, and advantage whatsoever now due or hereafter to arise or to be had or made by virtue thereof, and subject to all the terms, conditions, and provisions of said policy of assurance. To have and to hold the same unto the said Sarah A. Meggett and her heirs, executors, administrators, and assigns forever." The policy assures the life of Alexander Meggett and is payable at his death, and, "in case of the death of the said assured before the death of the said person whose life is assured, the amount of the said insurance shall be payable to the heirs at law of the said Alexander Meggett." The question presented by the demurrer goes to the legal effect of the assignment in view of the provisions of the policy.

The allegations of the complaint are in effect that the policy issued on Mary's application, that she paid the first premium, and that she was the beneficiary. It is not alleged in terms whether or not her father, the insured, thereafter paid the premiums, and, for the purposes of the question raised, we do not deem it essential to determine this fact, since presumably either she or her father, the insured, paid them. The facts as pleaded, then, are that she was the applicant for the insurance, she was named as beneficiary in the policy, either she or her father paid the premiums, and, before payment of the premiums had been completed, she made an assignment of the policy with the assent of the insured. We have then an assignment of this policy by the assured with the consent of the insured, the fact that the premiums due thereon up to

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the time of the assignment had been paid by them, and the presumption that the assignee paid the remaining unpaid premiums.

The right of the party who obtains insurance and pays the premiums for the benefit of another to make an assignment of an insurance policy is well established in this state. Counsel of both parties concede this. It has repeatedly been held that the person so obtaining, paying for, and carrying the insurance "may dispose of the policy by will or in other manner not inconsistent with the terms of the policy, to the exclusion of the beneficiary named therein." *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378. In the hands of such a party the policy has attached to it the right and power of such party to dispose of it as a chose in action in any of the ways provided by law. As declared in *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948, it represents a subsisting obligation, as do notes, bonds, and certificates, and evidences an amount to be paid at a time fixed by its terms, though it may lapse through failure to comply with its terms. But such a contingency cannot destroy its character as a transferable chose in action while it subsists as a valid obligation, and, when legally assigned, title to the proceeds of the policy becomes vested in the assignee. *Clark v. Durand,* 12 Wis. 223; *Estate of Breitung,* 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; *Slocum v. N. W. Nat. L. Ins. Co.* 135 Wis. 288, 115 N. W. 796.

The allegations of the complaint sustain the claim that at the time Mary, with the consent of the insured, assigned the policy to her stepmother, she and her father were in control of the policy, since they had obtained its issuance and had paid the premiums. Under these circumstances we perceive no reason why they, as owners of the policy, could not deal with it to the same extent as if the insured alone had obtained the insurance, paid the premiums, and kept control of the policy. The ownership and right to deal with the policy as a

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valid obligation was held by them jointly and vested in them all the rights held under the law of this state by the insured under the same conditions.

Nor do we find any restriction in the form of assignment limiting the transfer to any interest less than all the rights and interest inhering in the contract. We are of opinion that, when the assignment to Sarah A. Meggett was consummated, her rights and interest in the policy and its proceeds became absolute and the interest of all persons named therein as beneficiaries ceased. 2 May, Ins. §§ 388, 389; *N. Y. Mut. L. Ins. Co. v. Armstrong,* 117 U. S. 591, 6 Sup. Ct. 877.

Upon these considerations we must hold that the trial court properly overruled the demurrer.

By the Court.—The order overruling the demurrer of the individual defendants is affirmed.

CHASE, Respondent, vs. WOODRUFF and others, Appellants.

March 10—March 30, 1909.

Appeal: Former decision: Law of the case: Witnesses: Competency: Transactions with persons since deceased: Striking out testimony: Estoppel: Instructions to jury: Harmless errors.

1. The decision of this court on a former appeal as to the admissibility of evidence is the law of the case on a subsequent trial and appeal.
2. A defendant in ejectment was incompetent, under sec. 4069, Stats. (1898), to testify that at a certain time he saw the deed under which the plaintiff claims in the possession of the grantor, where he obtained such information in a transaction with said grantor, since deceased, in which the deed was shown to him by the grantor for the purpose of examination.
3. It is not error to strike out the answer of a witness which is not responsive to the question.
4. Evidence, introduced as supporting a defense of estoppel, as to a statement made by plaintiff, but which was not shown to

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have been known to or acted upon by the defendant or to have influenced him in any way, was immaterial and it was not error to strike it out.

5. In ejectment where there was not sufficient evidence to support a verdict for defendant on the defense of adverse possession, error in the charge upon that subject was harmless as to him.

6. Where it was held on a former appeal that under the evidence at the first trial the question whether a deed was delivered was for the jury, and on the second trial the evidence to show delivery was fully as strong, a finding by the jury that the deed was delivered cannot be disturbed.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was brought to recover possession of lot 4, block 25, in the city of Baraboo, and for damages for unlawfully withholding possession thereof from the plaintiff. The defendants denied the material allegations of the complaint and set up adverse possession in the defendant, and further set up the defense of estoppel by way of amendment to the answer. The case was tried to the court and a jury. Both parties moved for direction of a verdict. The motions were respectively denied and the case submitted to the jury and the following verdict returned:

"(1) Did Julius R. Woodruff deliver the deed dated March 4, 1868, to the plaintiff's wife with intent to pass title? *A.* Yes.

"(2) If your answer to question number 1 be 'Yes,' at what time was such delivery made? *A.* March 4, 1868.

"(3) Did the defendant and Julius R. Woodruff together have adverse possession of the lot in question for twenty years prior to April 6, 1906? *A.* No.

"(4) Is the plaintiff estopped to claim the title to this lot in question? *A.* No."

Motions were made by defendant to change the answers to the special verdict, for judgment upon the verdict, for judgment notwithstanding the verdict, and to set the verdict aside and for a new trial. Each and every of said motions were denied and judgment ordered for the plaintiff upon the

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verdict, fixing the damages at $20. Judgment was entered accordingly in favor of the plaintiff, from which this appeal was taken.

For the appellants there was a brief by *Dithmar & Malone* and *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

For the respondent there was a brief by *Goggins & Brazeau,* of counsel, and *H. E. Fitch,* attorney, and oral argument by *T. W. Brazeau.*

KERWIN, J. In 1855 Julius Woodruff was the owner of a farm of 120 acres near Baraboo, Wisconsin, and lots Nos. 3 and 4, block 25, in Baraboo. On lot 3 was the homestead of Julius Woodruff, which he occupied from 1855 until 1906. Lot 4 is involved in this action. Lots 3 and 4 were used together from 1855 until April 19, 1905, when Julius gave a warranty deed covering lot 4 to his son *Frank R. Woodruff,* defendant, which was recorded May 5, 1905, after which *Frank* proceeded to improve the lot and erect a dwelling house thereon, and executed a mortgage to the defendant *Alice M. Wright.* The mortgage was recorded January 29, 1906. Julius R. Woodruff died January 15, 1906, at the age of ninety-three. He was married three times, and Charles and defendant *Frank Woodruff* are the surviving children of the first marriage. Jennie Woodruff Chase was the only issue of the second marriage and no children were born of the third marriage, his third wife dying in September, 1907. On March 8, 1868, Julius Woodruff made and executed a deed, naming as grantees therein his three children, Jennie Woodruff, afterwards Jennie Woodruff Chase, *Frank Woodruff,* and Charles Woodruff, conveying the farm and lots, and expressing his intention therein to give to his sons equally the farm and the lots to Jennie. The controversy in this case turns upon the question of whether this deed was delivered, and, if so, when delivered, and whether all rights

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thereunder have been lost. Jennie Woodruff married the plaintiff November 25, 1898, and died intestate and without issue August 2, 1902. The plaintiff, her husband, survives her. After the death of Julius R. Woodruff and on the 9th day of March, 1906, plaintiff recorded the deed above referred to. This action is brought by plaintiff as successor in title to Jennie Chase to recover possession of lot 4 and damages for the withholding of possession. The warranty deed executed in 1868, heretofore referred to, was found in the trunk of Jennie Chase shortly after her death. The plaintiff rests his case largely upon the presumption of delivery arising from the possession of the deed by Jennie, and insists that such presumption has not been overcome by the evidence produced. Appellant claims judgment should be reversed for error committed on the trial.

1. Plaintiff put in evidence the deed of Julius R. Woodruff and proved that said deed was found in the trunk of Jennie Chase after her death. Plaintiff further offered evidence tending to strengthen the presumption of delivery arising from possession by Jennie. One Pelton, register of deeds of Sauk county from 1901 to 1905, was examined in chief by plaintiff respecting a conversation had with J. R. Woodruff shortly after he entered the register of deeds' office respecting the recording of a certain deed to Jennie, daughter of J. R. Woodruff, and stated that he (Woodruff) did not want the deed recorded. The evidence of Pelton was very general. It did not show that J. R. Woodruff had given the deed in question to Jennie, but that Jennie held a deed of the premises, and the intent of giving the deed was not gone into. On cross-examination of Pelton the question was asked: "You stated on your direct examination that he said that the deed had been given to Jennie. Did he tell you he had given it to Jennie for safe-keeping?" He answered: "I think so." This answer was stricken out and this ruling is

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complained of. The court stated in ruling this answer out that it so ruled upon the authority of the decision on the former appeal. *Chase v. Woodruff,* 133 Wis. 555, 113 N. W. 973. It seems the ruling of the lower court was correct under the opinion of this court upon a similar question in the above case, and whether the ruling was right or wrong it is the law of the case. *Hill v. Am. S. Co.* 112 Wis. 627, 88 N. W. 642; *State v. Wis. Cent. R. Co.* 133 Wis. 478, 113 N. W. 952. The ruling is hereafter referred to regarding the examination of defendant *Frank Woodruff.*

2. The plaintiff called defendant *Frank Woodruff* as an adverse party and interrogated him respecting his knowledge of the existence of the deed from Julius R. Woodruff to Jennie, *Frank,* and Charles Woodruff, and among other questions the following were put: "Is it not a fact that he told you that he had given it to Jennie? Answer that 'Yes' or 'No.' To give it, to give it over to her. Just what I said." To this the witness answered: "I could only answer it in this way: That I knew that he gave it to her." "*Q.* Is it not a fact that Julius R. Woodruff told you that he had given that deed to Jennie? *A.* Yes; he told me that he had given it to her, but that wasn't all he told me, though." The testimony as to delivery of the deed to Jennie was upon a vital issue in the case, namely, the delivery of the deed. It was also material in bringing notice to *Frank.* This evidence being brought out by plaintiff on direct examination of defendant *Frank* as an adverse witness, it is insisted that the door was opened and the defendant entitled to the whole of the conversation, part of which had been put in by the plaintiff, and defendant asked for the rest of the conversation, which was objected to and the question withdrawn. Afterwards the witness was recalled and the question again put, and an objection to it sustained on the authority of the opinion on former appeal, on the ground that the declaration was

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self-serving and therefore not admissible. This ruling, like the former referred to, is ruled by the decision on the former appeal, where the question was decided, and is binding here.

3. Appellant assigns error on the ground that the court struck out the answer of *Frank Woodruff* to the effect that he saw the deed in the possession of his father. This assignment of error covers the admission of evidence under objection to the effect that *Frank* saw the deed to Jennie in 1885 and the action of the court in striking out this evidence. It appears from the record clearly that this evidence involved a transaction with the deceased, Julius R. Woodruff, and therefore was incompetent under sec. 4069, Stats. (1898). *Frank* obtained the information concerning which he gave evidence in a transaction with Julius, in which the deed in question was shown to *Frank* by Julius for the purpose of examination. So we think no error was committed in excluding this evidence.

4. The following question was asked *Frank* by counsel for plaintiff on direct examination when called by plaintiff: "*Q.* You knew, did you not, that this deed of Julius R. Woodruff to Jennie Chase was not to be recorded until after Julius R. Woodruff's death, did you not? *A.* It was understood that it was not to be recorded at all unless he wanted it to be." This answer was not responsive to the question and was stricken out for that reason. Hence no error was committed in that regard.

5. In 1906 the plaintiff exhibited his deed to one Selleck at Baraboo, and the alleged error under this head relates to the conversation between plaintiff and Selleck to the effect that plaintiff stated he did not claim lot 4. The answer was stricken out, and this action of the court is complained of because the evidence was competent, and further that after the answer had been given it should not have been stricken out. This evidence bore upon the defense of estoppel. If the evidence was incompetent it was entirely proper for the

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court in the exercise of its discretion to strike it out. We fail to discover any error in striking out the evidence. The statement made was after defendant *Frank* had bought the lot and not in the presence of *Frank*. It does not appear that *Frank* had knowledge of the statement, if made, acted upon it, or was in the slightest degree influenced by it. We do not see that it was material upon the question of estoppel or that its presence in the record added anything to the defense. Indeed, we think it very doubtful whether there was sufficient evidence to support a finding in favor of the defendant upon the defense of estoppel.

6. Upon the defense of adverse possession error is assigned in the charge. We think the charge was erroneous, but shall spend no time in discussing it, since it was harmless, because we are of opinion that there was not sufficient evidence to support a verdict in favor of the defendant upon the defense of adverse possession.

7. Error is also assigned on the ground of the sufficiency of the evidence respecting the delivery of the deed to Jennie. Upon the evidence on the former trial this court held that the question was for the jury. But it is insisted that upon the last trial the presumption arising from possession of the deed was fully rebutted, and a very able argument is made by counsel for appellant upon that proposition. It would serve no useful purpose to review in detail the several points made by counsel under this head. It is sufficient to say that after a careful examination of the evidence we think it is fully as strong on the question of delivery in favor of the plaintiff on the last as on the first trial, and therefore we must hold that the question of delivery was for the jury and that their finding cannot be disturbed.

By the Court.—The judgment of the court below is affirmed.

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FOX, Respondent, vs. POSTAL TELEGRAPH-CABLE COMPANY, Appellant.

March 11—March 30, 1909.

Contracts: Validity: Public policy: Enforcement: Comity: Telegraphs: Stipulation against responsibility for negligence: Defense.

1. Though it is a general rule that the *lex loci* governs as to the validity of a contract, yet comity does not require recognition or enforcement, either as a basis of attack or defense, of a contract which, though valid under the *lex loci*, contravenes the public policy of the state in which such recognition or enforcement is sought.
2. A stipulation against responsibility of a telegraph company for negligence in transmitting or delivering a message is contrary to the public policy of this state, declared both in judicial decisions and in sec. 1778, Stats. (1898); and in an action in the courts of this state based on such negligence a stipulation of that sort is not available as a defense, even though it was valid in the state where the contract was made and valid in the state where the message was to be delivered and where the tort in failing to deliver it promptly was committed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action for damages for negligence respecting delivery of a telegram.

These facts were stated for a cause of action: Defendant, a New York corporation, at the city of New York, December 19, 1906, at about noon, Eastern time, received from plaintiff a message to be transmitted by its telegraph system to a person in the city of Chicago, at 100 Washington street, for the purpose of avoiding having such person make a useless trip from such city to the city of New York, as he contemplated doing, starting on the 2 o'clock p. m., Central time, train on such day. The message was important, which fact defendant was duly notified of at the time it was delivered for transmission. Defendant was also fully informed of the necessity of the message reaching the person to whom it was addressed before the leaving time of such train on such day.

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Had the message been expeditiously transmitted and delivered, it would have been received by the person to whom it was addressed, before 12 o'clock noon, Central time, December 19th aforesaid, and in ample time to have prevented the addressee from starting on the journey to New York. It was received at defendant's office at the Palmer House in Chicago at forty-six minutes past eleven a. m., Central time, on the day it was sent, but was not delivered at the place to which it was addressed until noon of the next day. By reason thereof the addressee started and made the journey to New York when he otherwise would not have done so, to the damage of the plaintiff in the sum of $157.37.

Defendant for a defense pleaded, among other things, that plaintiff wrote his message on one of defendant's ordinary blanks containing on the face this language:

"The *Postal Telegraph-Cable Company* . . . transmits and delivers this message subject to the terms and conditions printed on the back of this blank. . . . Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to."

The indorsement contained this language:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this one-half regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the *Postal Telegraph-Cable Company,* that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any UNREPEATED message beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery of an UNREPEATED message beyond fifty times the sum received for sending the same, unless specially insured. . . ."

Plaintiff did not request to have the message repeated nor to have it insured. The sum paid for the service was forty cents.

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The case turned on whether the language of the indorsement was binding upon plaintiff as a part of his contract with defendant respecting the transmission and delivery of the message. In respect thereto the trial court decided in plaintiff's favor, and also found all matters of fact set forth in the complaint, and held, by reason thereof, that plaintiff was entitled to judgment as prayed for in the complaint. Judgment was accordingly rendered.

For the appellant there was a brief by *Tenneys, Hall, Davies & Sanderson,* and oral argument by *F. W. Hall.* They contended, *inter alia,* that the stipulation upon the back of the telegraph blank used by the plaintiff was a binding contract. *Kiley v. W. U. Tel. Co.* 109 N. Y. 231; *Ayers v. W. U. Tel. Co.* 72 N. Y. Supp. 634; *Riley v. W. U. Tel. Co.* 26 N. Y. Supp. 532, 28 N. Y. Supp. 581; *Breese v. U. S. Tel. Co.* 48 N. Y. 132, Allen's Tel. Cas. 663, 680; *Halstead v. Postal Tel. C. Co.* 104 N. Y. Supp. 1016; *Halstead v. Postal Tel. C. Co.* 193 N. Y. 293; *Shaw v. Postal Tel. & C. Co.* 79 Miss. 670, 56 L. R. A. 486. It is not true that the courts of Wisconsin will not enforce a valid contract of another state which is contrary to the provisions of the law of this state. If such a contract in fact is not *contra bonos mores* it may be enforced if properly pleaded and proved. *Hull v. Augustine,* 23 Wis. 383; *Schoenberg v. Adler,* 105 Wis. 645, 649; *Brown v. Am. F. Co.* 31 Fed. 516. This court has sustained a contract made in another state with respect to usury, although against the policy and the express statute of Wisconsin. The transmission of the telegram in question was business done outside of the state, by contract made outside of the state, and was entirely to be performed outside of Wisconsin, and is not governed by the public policy of Wisconsin nor the express law of Wisconsin, since it is a New York contract and falls within the approval of the public policy of the United States relative to the control of interstate commerce. *W. U. Tel. Co. v. Pendle-*

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ton, 122 U. S. 347; Joyce, Electric Law, § 128; *Rixke v. W. U. Tel. Co.* 96 Mo. App. 406, 70 S. W. 265; *Primrose v. W. U. Tel. Co.* 154 U. S. 1; *W. U. Tel. Co. v. Coggin,* 68 Fed. 137; *Hartford F. Ins. Co. v. C., M. & St. P. R. Co.* 62 Fed. 904, 906. The rights of the parties to the contract and the terms of the recovery for damages due to negligent delivery in Illinois are governed by the terms of the contract; and this is so whether the action sounds in tort or in contract. Wharton, Confl. of Laws, § 478, p. 1104; Croswell, Electricity, 407; *Clement v. W. U. Tel. Co.* 137 Mass. 463.

For the respondent there was a brief by *Olin & Butler,* and oral argument by *H. L. Butler.*

MARSHALL, J. It may be conceded for the purposes of this case that the place of the contract between plaintiff and defendant was New York and that by the law of such state the provision on the back of the message was a valid part of the agreement. *Elwood v. W. U. Tel. Co.* 45 N. Y. 549; *Breese v. U. S. Tel. Co.* 48 N. Y. 132; *Young v. W. U. Tel. Co.* 65 N. Y. 163; *Kiley v. W. U. Tel. Co.* 109 N. Y. 231, 16 N. E. 75; *Pearsall v. W. U. Tel. Co.* 124 N. Y. 256, 267, 26 N. E. 534. In connection with that, it must be conceded, since the tort was committed in the state of Illinois, the cause of action, such as there was, grew out of a violation of the laws of that state. But neither of such concessions nor the fact, if it be fact, that an action on the claimed liability could not be maintained in the courts of New York or those of Illinois, settles the question of whether it was proper for the courts of this state to entertain it.

It has long been settled here that such a provision as that in question is void as contrary to public policy. *Hibbard v. W. U. Tel. Co.* 33 Wis. 558; *Candee v. W. U. Tel. Co.* 34 Wis. 471. So we turn to this question: Can a contract which is so contrary to the public policy of this state as to be void if made

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here, be, nevertheless, judicially enforced here if valid in the state where it was made or breached?

The general rule is that a contract is governed by the law of the place thereof. If by such law it is valid, it is likewise valid everywhere. That, like most general rules, is not universal. It has exceptions. The doctrine, as to such exceptions, is stated in 2 Kent, Comm. (14th ed.) 458, to the effect that the courts of one state will not enforce contracts which, though valid in the place where made, contravene their policy. *Bartlett v. Collins,* 109 Wis. 477, 482, 85 N. W. 703.

The doctrine as to recognition of foreign contracts in the courts of a state, if valid by the laws of the home jurisdiction, rests in comity. Therefore, it must necessarily rest in sound judicial discretion to limit it, and its general limitations exclude those agreements which are injurious to public rights, or offend against public morals, or contravene public policy, or violate public law as recognized in the place of the forum. Many illustrations of this are found in the books, some of which are cited to our attention by counsel for respondent. *Chicago, B. & Q. R. Co. v. Gardiner,* 51 Neb. 70, 70 N. W. 508; *International & G. N. R. Co. v. Vandeventer* (Tex. Civ. App.) 107 S. W. 560; *Building & L. Asso. v. Griffin,* 90 Tex. 480, 490, 39 S. W. 656; *Northern Pac. R. Co. v. Kempton,* 138 Fed. 992; *Union L. & E. Co. v. Erie R. Co.* 37 N. J. Law, 23; *Comm. Mut. F. Ins. Co. v. Hayden,* 60 Neb. 636, 83 N. W. 922; *Pennsylvania Co. v. Kennard G. & P. Co.* 59 Neb. 435, 445, 81 N. W. 372; *Liverpool & G. W. S. Co. v. Phenix Ins. Co.* 129 U. S. 397, 9 Sup. Ct. 469; *Knott v. Botany Mills,* 179 U. S. 69, 71, 21 Sup. Ct. 30; *The Guildhall,* 58 Fed. 796; *The Glenmavis,* 69 Fed. 472; *The Kensington,* 183 U. S. 263, 269, 22 Sup. Ct. 102; Story, Confl. of Laws, §§ 38, 244.

An examination of those authorities will leave no doubt respecting the principle stated. Every state, within certain limitations not necessary here to indicate, has a constitutional right to establish its own peculiar policy. That may be done

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by legislative enactment or by judicial conception and interpretation of the common law. When done its courts should, and always aim to, administer the public will by giving effect to such policy. "The general principle that the *lex loci* governs as to the validity of contracts is subordinate to and qualified by," as said by WHITE, J., in *The Kensington, supra,* the supreme principle which inheres in the very nature of sovereignty, that comity cannot set at naught the public policy of a country. Under that principle courts have uniformly regarded the public policy of the place of the forum as superseding the right of a defendant to the benefit of a defense which he might have at the place of the contract, but which is directly contrary to the public policy of the jurisdiction where it is sought to be enforced. That doctrine has, at times, been vigorously attacked as contrary to the constitution of the United States, but never successfully, and it has been nowhere more uniformly applied than by the federal supreme court.

What has been said, necessarily, disposes of this appeal in favor of respondent. The stipulation against responsibility for negligence, as we have seen, would be void in a Wisconsin contract by the settled unwritten law of the state supposed to be reasonably necessary for the protection of our citizens and all persons submitting to our laws or invoking their aid through the instrumentality of our courts. It would not only be void by state policy, judicially declared, but by the written law as well. Sec. 1778, Stats. (1898), provides that "any person, association or corporation operating or owning any telegraph or telephone line doing business in this state shall be liable for all damages occasioned by the failure or negligence of their operators, servants or employees in receiving, copying, transmitting or delivering dispatches or messages." Therefore, the courts will not lend their aid to enforce such a stipulation, regardless of where made, either as a basis for attack or defense.

By the Court.—The judgment is affirmed.

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SWANKE, Respondent vs. HERDEMAN and others, imp., Appellants.

March 11—March 30, 1909.

Sales: Fraud: Knowledge with which purchasers are chargeable: Unsoundness of horse: Questions for jury: Tender of rescission: Defects: Waiver: Nonnegotiable notes: Signature procured by fraud: Delivery: Appeal: Costs: Printed case violating rule.

1. Purchasers of a horse, defending on the ground of fraud an action on a note given for the price, are chargeable with knowledge, at the time of purchase, of such facts only as were obvious to them in view of their capability to observe and the opportunities accorded them.
2. Upon the evidence in such an action it is *held* that the questions whether the purchasers of a stallion represented as sound and as having been newly imported had such notice of physical defects or such opportunity for observation that they were chargeable with knowledge thereof, and whether, after discovery of the unsoundness, there had been an election to retain the stallion or such unreasonable delay in notifying the vendor of an election to rescind the sale as would estop the purchasers from their right to rescind, should have been submitted to the jury.
3. Technical insufficiencies in a tender of rescission and return by purchasers may be waived by a categorical and absolute refusal of the vendor to entertain the proposal at all.
4. Where the signers of a nonnegotiable note, or some of them, were induced to sign it upon the understanding that, although it remained in the hands of the payee to obtain more signatures, it was not to be delivered so as to take effect until signed by a certain number of responsible makers, and it was not in fact so signed, it had no effect or existence as a promissory note as against the signers.
5. No costs are allowed for the printing of a case which contains the whole testimony *in extenso*, in violation of Supreme Court Rule 6.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action on a nonnegotiable joint and several note, given for a stallion sold to the defendants by one Keller, who was in fact agent for himself and several others; the note having

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been transferred to the plaintiff with a guaranty signed by the former owners of the horse. The first defense was fraud in falsely representing the horse as then newly imported from reputable dealers in Illinois and as being sound, and that upon learning their falsity the defendants had rescinded, notified Keller, offered to return the horse and demanded surrender up of the note, which offer and demand had both been refused. Another defense was that the note had never come into effect, because never signed by fifteen responsible share-takers, and certain of the signatures were colorable only, being under a secret and fraudulent agreement that Keller should pay for and protect such signers.

The evidence tended to show the following facts: That a subscription was procured nominally for shares in the horse on the understanding that fifteen shares of $200 each were to be subscribed before the subscriptions should become effective and the note signed by fifteen responsible parties before it should take effect. After fifteen ostensible subscribers had been obtained this note was signed by twelve of them, one pretending to take two shares. Two or more of the shares were ostensibly paid for in cash, but really with money furnished by Keller to the subscribers privately and paid back to him in presence of the defendants or most of them. Keller, both at the time of taking the subscription and subsequently at the time of the signing of the note, made definite representation as stated in the answer. The horse was at all times in a barn in Symco so situated that he could not be inspected easily. Most if not all of the defendants were not expert horsemen qualified to know by hasty observation as to soundness, and various acts of Keller were testified to in the way of haste and excuses tending to obstruct or divert from careful inspection. After the horse was delivered he was found to be weak in the ankles and to have what are described as "cocked ankles." It was also learned that he had not been directly imported from the dealers in Illinois, but had been owned by

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an association known as the Tigerton Horse Association, and had already been bred for the preceding season at and near Tigerton, about twenty miles from defendants' residences. Shortly after the ascertainment of these facts, except the non-joinder of the two or three ostensible subscribers, the defendants sent a delegation of their number to interview Keller and attempt to secure rescission, which they did, and were met with an absolute refusal to rescind, followed by a promise by Keller to come to Symco and meet the subscribers. After some delay and further solicitation he did so, and an oral offer of rescission and return was made to and unqualifiedly refused by Keller. Afterwards a written tender of rescission and return was made and a suit in equity was commenced to declare rescission and cancellation of the note, which was dismissed on the ground that defendants had an adequate legal remedy by defense. See *Johnson v. Swanke,* 128 Wis. 68, 107 N. W. 481. No use was made of the horse by the defendants, and after a time he was sold adversely in enforcement of a lien for his keep, and was bid in by three or four of his former owners. Evidence was introduced tending to show that the weakness of ankles was a congenital defect likely to be communicated to his progeny, and that it greatly impaired, if not destroyed, his value for the known purpose of his purchase as a breeding stallion.

At the close of the trial a verdict was directed for the plaintiff and judgment entered thereon, from which the defendants appeal.

For the appellants there was a brief by *Browne, Browne & Fisher,* and oral argument by *E. E. Browne.*

For the respondent there was a brief by *Goodrick & Goodrick,* attorneys, and *Kreutzer, Bird & Rosenberry,* of counsel, and oral argument by *C. B. Bird.*

DODGE, J. The record discloses evidence which would justify a jury in finding the making, the falsity, and materiality

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of the two alleged misrepresentations, namely, that the horse had been freshly imported from a well-known and responsible firm of dealers in Illinois and that he was sound in every respect and suitable for breeding purposes. Indeed there is nothing to indicate that the trial court decided otherwise. The direction of verdict apparently was based upon the view that the defendants had not been diligent before signing the note to ascertain as to the falsity of such representations, and that they had not promptly exercised any right of rescission that they might have had after discovery of such falsity. Of course, to justify the court's action, these facts must have appeared conclusively, and without any evidence which, in any view thereof, and with most favorable intendments and inferences to the defendants, tended to prove the contrary. The character of the opportunity and the degree of diligence required of the purchaser of property in order to preclude belief in his reliance upon misrepresentations made by the seller has been so often discussed that no repetition is necessary. *Jacobsen v. Whitely, ante,* p. 434, 120 N. W. 285, and authorities there collected. Under the rule stated in that case the defendants are chargeable with knowledge only of such facts as were obvious to them in view of their capability to observe and the opportunities accorded them. With reference to the physical defects in the horse, while ascertainable by a careful inspection made by a skilled horseman or veterinary, there was much evidence of the incapacity of any of these defendants to observe and appreciate either the fact or the significance of the horse's unsoundness, even had he been fully exhibited to them, and there was also much evidence of conduct on the part of the seller tending to delude and divert many of them from such inspection; also that this conduct was accompanied by the practical bribery of two or three of the ostensible share-takers upon whose judgment the others evidently relied to some extent, and whose favorable attitude toward the trade was thus influential, as it might be inferred

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that Keller well knew and intended. These and the many other circumstances were in our judgment sufficient to raise a question of fact for the jury whether or not these defendants had such notice of the physical unsoundness of the horse or such opportunity for observation that they could not have been ignorant thereof without closing their eyes to plain facts. As to falsity of the representation of direct importation of the horse there is little, if any, showing of any opportunity to discover it before consummation of the sale. It was not until investigation was made, some twenty miles from where they resided, that the fact of previous use in the vicinity, or any suspicion of it, is shown to have come to the defendants.

Neither can we agree with the trial court that the evidence was conclusive of either an election to retain the horse or of unreasonable delay to notify the seller of defendants' election to rescind after the discovery of the unsoundness. Certain physical infirmities were discovered by one of the defendants the day after the purchase; but whether they constituted material unsoundness or merely some temporary illness and were immaterial could not at once be ascertained. Considerable time was necessary for him to communicate with the other defendants, and for them, in association, to obtain advice and information as to the character of these defects. Then, two or three days after the infirmities had come to the knowledge of the defendants, and within approximately two weeks after the transfer of the horse, they made up and appointed a committee who forthwith proceeded to investigate as to the history of the horse, and to that end made a trip to Tigerton, and thence to a neighboring town, to meet Keller, to whom they notified their desire to rescind, receive back their note, and give up the horse. Any delays thereafter were due to Keller rather than to the defendants. Meanwhile no use whatever was made of the horse. We are satisfied that a jury might well have concluded from all the facts and circumstances that no unreasonable delay had intervened such as

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would estop the defendants from their right to rescind, nor any ratification or affirmance of the sale.

Some technical insufficiencies in the tender of rescission and return are urged by respondent, but evidence tended to show so categorical and absolute refusal by Keller to entertain the proposal at all that it might be reasonably inferred that any more complete tender would have been futile, and was waived.

As to the second defense, there was evidence tending to prove almost the identical situation discussed in *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192. Upon the authority of that case, if the jury believed that these defendants or some of them were induced to sign this note upon the understanding that, although it remained in the hands of Keller to obtain other signatures, it was not to be delivered so as to take effect until signed by fifteen responsible signers, and that it had not in fact been so signed in good faith, then it had no effect or existence as a promissory note as against any of these defendants. *Aukland v. Arnold,* 131 Wis. 64, 111 N. W. 212. We have no doubt that there was evidence from which a jury might have so found, and might also have found that there were no acts on the part of the defendants signifying an election to ratify the purchase after discovering the nonsignature or fictitious signature of the note.

The printed case on this appeal is an egregious infraction of Supreme Court Rule 6, providing that appellant "shall print a case containing an abridgment of the record, so far as necessary to present the questions for decision." It is in no sense an "abridgment," for the whole testimony is printed *in extenso,* question and answer, with all its needless and unhelpful repetitions, to the unnecessary extension of the case by nearly one half and to the very considerable aggravation of the routine labors of this court. Rule 44 prohibits the allowance of any costs for the printing of such a case.

By the Court.—Judgment reversed, and cause remanded for new trial; no costs for printing case.

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CURTISS, Respondent, vs. TOWN OF BOVINA, Appellant.

March 11—March 30, 1909.

Highways: Bridge built by private individuals: Adoption by town: Injuries from defects.

1. A public highway was laid out to the west bank of a river, but the town board expressly refused to extend it across the river or to assist in building a bridge. Several years earlier the owners of land east of the river had built a bridge at this point, and they maintained and continued to use it after the highway was laid out to the river; but the town authorities did nothing to keep it in repair, nor did they treat it as a part of the highway, although on one occasion they did, at the request of the landowners who were maintaining the bridge, permit such owners to take and use, in repairing it, some boards which had been removed from a culvert or other bridge and were not then needed for the immediate use of the town. *Held*, that the bridge was not part of the highway so as to render the town liable for injuries caused by defects therein.
2. To estop a town, in such a case, from denying that the bridge was a part of its highway there must be evidence clearly tending to show an adoption of it as such by the town.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action to recover damages claimed to be due to a fall caused by a defective bridge crossing the Schioc river. It is alleged that the bridge constituted a part of a highway on a town line which was maintained by the defendant town.

The bridge in question crosses the Schioc river. A highway has been laid out and leads up to the river on the west, so that the north line of the bridge and the south boundary of the highway as laid out practically meet and make one line. The bridge was constructed by the owners of the land situated on the east side of the river under an arrangement with the town that if the town would lay out the road to the river they would build the bridge. In approaching the bridge from the east it is necessary to drive over private property, there being no highway leading to the bridge from the east. An order of

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ten years ago laying out the highway to the bank of the river was defective, and the road was closed by one of the owners of the property over which it was laid out. About five years ago the highway was legally laid out to the west bank of the river. About five years ago the planks on the bridge had become rotted, and parties having land on the east side of the river placed a layer of boards over the bridge on top of the old rotted boards. There was evidence on the trial of the instant action that these boards were some old planks which had been in use on an abandoned culvert or bridge of the town, and that the parties who had built and used the bridge obtained permission from the town officers to take and use them for repairing the bridge. No work was ever done on the bridge by the town. The town had expended money upon repairs on the road to the west of the bridge.

The bridge had been constructed to enable the owners of the land to the east of the river to cross to the highway with loads of hay and wood from their lands, and at the time of the accident the plaintiff was hauling hay for an owner of land to the east of the bridge. The distance between the outer edges of the outside timbers of the bridge was about six feet. As originally constructed, the planks which made the roadway projected beyond the timbers three or four feet. The planks which were used to repair the bridge and were laid on top of the old planks were about six feet long and projected but little over the outer edges of the timbers. The plaintiff testified that he had driven onto the bridge and that the wagon slipped upon some ice and was thrown over the edge of the top layer of planks onto the old rotted ones, that these planks gave way, and that he and his load of hay were precipitated upon the ice on the river, and that he sustained severe injuries. The horses broke loose with the front wheels of the wagon, ran away, and were cut and seriously bruised and injured.

The instructions of the court left the jury to determine whether or not the town had suffered the bridge to remain and

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to be used by the public as a highway or crossing in connection with the public highway to such an extent and for such a length of time as to have become a thoroughfare or public highway. The court submitted the following question to the jury: "Was the place where the plaintiff was injured a public highway?" To this the jury answered "Yes." The jury found for the plaintiff on the various questions submitted in a special verdict, and the court awarded judgment on the verdict. This is an appeal from the judgment so awarded.

Francis J. Rooney and *A. M. Spencer,* for the appellant.

For the respondent the cause was submitted on the brief of *Classon & Frank.*

SIEBECKER, J. The trial court held that the inquiry as to whether or not the bridge in question was a part of the highway of the defendant town was one for the jury under the evidence adduced. The evidential facts to support plaintiff's claim that the bridge is part of the highway are that the bridge is adjacent to and a continuation of the road laid out by the town authorities to the west shore of the river, that persons using the road would necessarily have to use the bridge to cross the river in driving to any place on the east thereof, and that the persons who own land on the east of the river have in fact used the bridge as part of the road. In view of the undisputed facts explaining such use of the bridge, this evidence is not proof in itself that the bridge is a part of the highway. The uncontradicted facts are that the town board laid out the highway to the west bank of the Schioc river and expressly refused to extend it across the river so as to include the bridge. The town board also refused to assist in building a bridge over the river to enable the owners of lands on the east of the river to use the highway on the west. Several years prior to laying out this road the owners of lands to the east of the river built this bridge for ingress and egress. They offered to maintain it for such purpose after the highway was established to the river, and

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they so maintained the bridge afterward. The town authorities did nothing to keep it in repair nor did they treat it as part of the highway.

The plaintiff, however, claims that the town officers aided in maintaining and repairing the bridge by furnishing material for its repair, and in view of its location and proximity to the highway gave ground for the belief that it constituted a part of the highway. The evidence does not justify this claim. It appears from the uncontradicted testimony that the parties who offered to maintain this bridge besought the town officers to permit them to take and use boards for repairing this bridge which had been removed from a culvert or another bridge and were not then needed for the immediate use of the town, that the officers granted such request, and that the material was so applied by these parties. There is nothing in this conduct to warrant an inference that the town authorities maintained and repaired this bridge as part of the highway. On the contrary, the testimony is positive that they regarded the bridge as a private way and not as part of the highway. The trial court submitted the case upon the theory that the evidence justified the conclusion that the town had adopted the bridge as a part of its highway and was estopped from denying in this action that it was a lawful highway. A study and examination of the evidence convinces us that the testimony does not permit of such an inference and that it was error to submit such an issue to the jury. To estop the town from denying that the bridge was a part of its highway requires that there should be evidence clearly tending to show an adoption of the alleged highway by the town. We find no such evidence in the record. *Houfe v. Fulton,* 34 Wis. 608; *State ex rel. Lightfoot v. McCabe,* 74 Wis. 481, 43 N. W. 322; *Bogie v. Waupun,* 75 Wis. 1, 43 N. W. 667.

By the Court.—The judgment is reversed, and the cause remanded with directions to award judgment dismissing the complaint.

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OCONTO BREWING COMPANY, Respondent, vs. CAYOUETTE, Appellant.

March 12—March 30, 1909.

(1) *Appeal: Order granting new trial for error of law: Review.* (2, 3) *Contracts: Validity: Lack of mutuality: Executed contract.*

1. Where it is plain that a new trial was granted, not in the exercise of discretion, but because of supposed error of law committed by the trial court, the supreme court, on appeal, will review the question of law so presented.
2. A contract which is not enforceable while executory because of want of mutuality becomes valid when executed.
3. A contract whereby a brewing company, to induce a saloonkeeper to sell its beer, agreed to erect a beer depot in the city and deliver its beer therefrom every morning, and that until such depot was built he was not to pay for the beer furnished to him, is valid after performance by the saloonkeeper and, the company having failed to build the beer depot, is a complete defense to an action for the value of the beer furnished.

APPEAL from an order of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This action was brought by the plaintiff, a brewing company, to recover from the defendant $133.50 for beer delivered to defendant, a saloonkeeper in the city of Shawano, between the 22d day of November, 1906, and the 9th day of April, 1907. The plaintiff's cause of action is upon express contract, to the effect that defendant promised to pay an agreed price for said beer. The defendant answered in effect that the plaintiff was anxious to place its goods in Shawano to be handled by defendant, and that it agreed to erect a beer depot in the city of Shawano and deliver its beer therefrom every morning, and that until such depot was built defendant was not to pay for the beer furnished, and that if such depot was not built plaintiff would not require the payment for beer delivered after the 22d day of November, 1906, and

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would refund to defendant the moneys paid by him for beer prior to said November 22, 1906, and that plaintiff never fulfilled its promises and never built the depot; and, owing to the fact that defendant had no facilities for taking care of the beer, it was damaged, which caused defendant loss in his business. The defendant also counterclaimed to recover money paid before November 22, 1906, but the counterclaim was disallowed by the court.

The evidence offered tended to support the allegations of the answer, and the jury found a general verdict for the defendant. Thereupon the plaintiff filed a motion for a new trial upon the grounds: (1) That the court erred in overruling the plaintiff's objections to evidence under the answer; (2) error in admitting evidence; (3) error in refusing to allow plaintiff to examine the jury fully as to qualifications; (4) error in refusing to direct a verdict for the plaintiff; (5) because the verdict is contrary to law; (6) because the verdict is contrary to the evidence. Also a motion for judgment notwithstanding the verdict. On the hearing of these motions the court granted the plaintiff a new trial on the ground that the verdict was contrary to law. This appeal is from the order granting a new trial.

P. J. Winter, for the appellant.

For the respondent the cause was submitted on the brief of *Allan V. Classon.*

KERWIN, J. It is insisted by appellant that the court did not grant a new trial under its discretionary power in that regard, but because of error of the court, and that this is manifest from the fact that no costs were awarded as a condition. It is very plain from the order itself, as well as from the fact that no costs were imposed as a condition of the new trial, that it was granted for error of the court. *Frost v. Meyer,* 137 Wis. 255, 118 N. W. 811; *Giese v. Milwaukee E. R. & L. Co.* 116 Wis. 66, 92 N. W. 356. While considerable dis-

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cretion is vested in the trial court respecting the granting of a new trial, yet, where it is plain that the new trial was granted for alleged error of law committed by the trial court, this court will review the question of law so presented. *Duffy v. C. & N. W. R. Co.* 34 Wis. 188; *Walter A. Wood R. & M. Co. v. Stenel,* 71 Wis. 71, 36 N. W. 636; *Jones v. Evans,* 28 Wis. 168; *Fairbanks v. Holliday,* 59 Wis. 77, 80, 17 N. W. 675.

There are several alleged errors of law committed by the court upon the trial and covered by the motion for a new trial, still it does not definitely appear from the record upon what ground the trial court held that the verdict was contrary to law. We assume, however, from the argument of counsel on both sides that in granting the new trial the court below came to the conclusion that the alleged contract for the purchase of beer referred to in the statement of facts was void, either for want of mutuality or for want of consideration, or both; hence that the answer, and the evidence offered to support it, constituted no defense. Therefore the plaintiff was entitled to recover as a matter of law upon the showing made.

We cannot agree with this conclusion. We see no reason why a valid contract might not have been made based upon the alleged agreement for the furnishing of beer by the plaintiff to the defendant gratis, as specified in the contract; and whether this contract could be enforced while executory for want of mutuality we need not consider, because it appears that when the action was brought the contract had been fully performed and was then an executed contract, and under the repeated decisions of this and other courts, even though a contract is not enforceable while executory by reason of want of mutuality, it becomes valid when executed. We are therefore of the opinion that the evidence was sufficient to support the verdict of the jury in the defendant's favor on the alleged contract and execution thereof, and that such finding is a complete defense to the plaintiff's cause of action. Assum-

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ing, therefore, as we must from the record that the new trial was granted on the grounds heretofore suggested, the court was in error in holding that the verdict was contrary to law. The order should therefore be reversed.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

TOWN OF ROLLING, Appellant, vs WUNDERLICH, Respondent.

March 12—March 30, 1909.

(1) *Appeal: Review: Assumption as to facts.* (2–4) *Towns: Purchase of half interest in hall: Land included: Petition construed: Town officers: Liability for money received: Authority to bring action.*

1. Upon appeal from a judgment entered on a directed verdict, the assumption as to matters of fact whereon the evidence was conflicting must be most favorable to the appellant.
2. A petition of freeholders, emanating from an association which owned a hall and the lots upon which it stood, asking submission to the electors of the question of raising a certain sum to buy "a one-half interest in the hall," means, *prima facie*, an undivided one-half interest in the building and in the grounds on which it stands, free from incumbrances.
3. The chairman of a town board, who was also an officer of an association owning a hall and the land on which it stood, presented to the town clerk a petition of freeholders asking submission to the electors of the question of raising money to buy a half interest in such hall. This petition was not filed nor the notices given a sufficient time before the town meeting, but the proposition was carried at such meeting. The chairman, acting both for the association and for the town, procured a town order for the amount to be paid, receipted for it as an officer of the association, and delivered it to the association without requiring any conveyance from the association to the town, and thereafter, as a creditor of the association, had the order transferred to him and obtained the money thereon. *Held*,

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that his dereliction in duty as a town officer in failing to obtain the conveyance, combined with the defects in the proceedings, rendered him liable to the town for the return of the money, with interest.

4. A resolution adopted at town meeting instructing the town officers to start an action against two persons named unless satisfaction as to a certain matter was obtained, was sufficient to authorize an action against one or both of such persons.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Kreutzer, Bird & Rosenberry,* and oral argument by *C. B. Bird.* They cited *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; sec. 776, subd. 10, and secs. 788, 789, Stats. (1898); *Hubbard v. Williamstown,* 61 Wis. 397, 21 N. W. 295; *Fox Lake v. Fox Lake,* 62 Wis. 486, 22 N. W. 584.

T. W. Hogan, for the respondent, cited, among other cases, *State ex rel. Manitowoc v. County Clerk,* 59 Wis. 15, 16 N. W. 617; *Wickham v. C. & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982; *State ex rel. Mitchell v. Decatur,* 58 Wis. 291, 17 N. W. 20; *State ex rel. Wunderlich v. Kalkofen,* 134 Wis. 74, 113 N. W. 1091.

TIMLIN, J. The appellant town brought an action against the respondent to recover the sum of $656, money of said town alleged to have been received by respondent without any consideration therefor. Counsel for the appellant designates it as an action for money had and received. At the close of the evidence the circuit court directed a verdict for defendant.

The facts in evidence are that an association called the Modern Woodmen of America, Sunrise Camp No. 3062, owned a hall situated on lots 2 and 3 of block 16, village of Elmhurst, in the plaintiff town. Respondent was an officer of that association and chairman of the town board of supervisors, and the association owed him more than $656 for ma-

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terial used in construction of the hall. Fifteen freeholders of the town presented to the town clerk a written request emanating from the association that there be submitted to the vote of the electors at the annual town meeting to be held on the 4th of April, 1905, the question whether the town raise the sum of $656 for the purpose of buying a one-half interest in the hall in question. There is a conflict of evidence as to whether this was delivered to the town clerk on March 10, 1905, or about March 27, 1905. The clerk posted notices required by statute to the effect that this question would be brought before the electors at the coming annual meeting, but there is a conflict of evidence as to whether these notices were posted fifteen days before the town meeting or upon March 29, 1905. The statutory requirements are found in secs. 776, 778, and 779, Stats. (1898), and ch. 309, Laws of 1903.

Because a verdict was directed, we must assume as most favorable to the appellant, for the purpose of this review, that the petition of the freeholders was delivered to the town clerk less than twenty days before the holding of the town meeting and that the notices were posted up less than fifteen days prior to such meeting. The clerk failed to make any record of the petition or notice. The matter was laid before the electors at the ensuing town meeting, and the proposition to purchase was carried by a vote of 91 to 87. This item of $656 was thereafter placed in the tax roll and collected. March 27, 1906, the town board issued an order to the Modern Woodmen of America for $656 as the purchase price of the half interest in the hall. The defendant as officer of the association received and receipted for this order and delivered it to the association, which took it into its treasury. Thereafter, pursuant to a resolution which had been adopted on June 17, 1905, the association delivered this town order to the defendant in payment of his demand against the association. He credited the association with that amount on his books and forwarded the town order by mail to the treasurer of the

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town, who paid the same to him some time after April, 1906. The defendant's term of office as chairman of the town board of supervisors expired in April, 1906, and he was succeeded in that office by one Kalkofen. The town occupied the hall for town purposes from April, 1905, to the spring of 1908. But there had been a previous occupancy by the town under oral lease or agreement, which occupancy continued without interruption. A warranty deed of a half interest in the lots in question, in which the plaintiff was grantee, was tendered to the defendant for execution by one of the supervisors and the defendant refused to sign it. He had no title to the property at the time. This tender was made in May or June, 1906. He objected to giving a deed because the petition, as he claimed, did not state that they were to convey any lots or real estate to the town but only a half interest in the hall. He also objected because the deed purported to run from him to the town. Who was grantor in this deed does not clearly appear.

It was admitted during the trial "that the title to lots 2 and 3, block 16, village of Elmhurst, which is the lot known as the Modern Woodmen Hall in that village, stands as follows: On December 27, 1900, there was a deed made from H. P. Carle to grantee Sunrise Camp No. 3062, Modern Woodmen, of Elmhurst, Langlade county, Wisconsin, recorded in volume 49 of Deeds, page 256, which is the lot upon which the Modern Woodmen of America Hall stands." In this condition and upon this form of petition, "for the purpose of buying a one-half interest in the hall," etc., *prima facie* the association sold and the town purchased an undivided one-half interest in the building and in the grounds upon which it stands free from incumbrances. This is *prima facie* the proper construction of the instrument. *Wilson v. Hunter,* 14 Wis. 683; *Clements v. Collins,* 2 Term Rep. 498, 502; *Gibson v. Brockway,* 8 N. H. 465, 470; *Board of Ed. v. State,* 64 Kan. 6, 67 Pac. 559; *Common Council v. State,* 5

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Ind. 334; *Rogers v. Smith,* 4 Pa. St. 93; *Eliot v. Carter,* 12 Pick. 436, 440; *Brown v. Turner,* 113 Mo. 27, 20 S. W. 660; *Bacon v. Bowdoin,* 22 Pick. 401; *Webster v. Potter,* 105 Mass. 414; *Workman v. Ins. Co.* 2 La. 507, 22 Am. Dec. 141; *Wade v. Odle,* 21 Tex. Civ. App. 656, 54 S. W. 786, 788.

We have then a case where the chairman of the town board of supervisors, who was also officer of an association owning a hall and the lot upon which it stood, presented to the town clerk a petition signed by fifteen electors, asking that the question of purchasing a one-half interest in this hall be submitted to the voters at the ensuing town meeting. The petition is presented and filed and the notices that this subject would be voted upon given short of the time required by law. The petition on its face, fairly construed, means to purchase a half interest in the hall and in the lots upon which it stands. Notwithstanding the informality in presentation of this question to the electors, the proposition to purchase was carried. The supervisor, acting for the association and for the town, procures a town order for the amount payable to the association, receipts for it as officer of the association, and delivers it to the association without requiring any conveyance to the town from the association. This is a manifest dereliction of duty on his part as chairman of the town board of supervisors. No prudent man would conduct his business in this way. He receives the town order back from the association and procures the money thereon from the town treasurer. The upshot of the whole matter is that by dereliction of his duty as town officer he has come into the possession of $656 of the money of the town for which the town has received no consideration except the occasional use of the hall during two years.

The question of purchase was not submitted to the electors as required by statute. Whether this irregularity standing alone would have been sufficient to entitle the town to recover

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had the town received the consideration, and considering that the funds were raised by taxation and came into the town treasury for this purpose, we need not here determine. But the omission to file the petition within the time required by law, the failure to give the notice so required, the delinquency of the defendant in failing to insist upon a conveyance to the town before or at the time of delivering the town order and while he was acting in the dual capacity of town officer giving, and association officer getting, the town order, and his subsequent receipt of the money from the town treasurer as transferee of the association, which, to his knowledge, had rendered no consideration for this money, combined with the defects above noted in the proceedings, rendered the defendant liable for the return of this money, with interest at the legal rate, if such facts can be considered established. *Remington v. Ward,* 78 Wis. 539, 47 N. W. 659; *Glendale Inv. Asso. v. Harvey L. Co.* 114 Wis. 408, 90 N. W. 456; *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603. There was, to say the least, a case for the jury, and the direction of a verdict for defendant was error.

It is contended there was no sufficient authority to bring this action conferred by the electors upon the present town officers. This authority was in the form of a resolution adopted at town meeting, which instructed the town officers "to start an action against the Modern Woodmen of America and *George Wunderlich,* especially if they don't get satisfaction about the town hall." The resolution is sufficient. Under this resolution it was for the counsel employed, skilled in the law, and not for the electors or the officers, to determine what form of action would be most appropriate and effective upon the existing facts, and also to determine whether the action should be joint or several.

The judgment of the circuit court should be reversed, and the cause remanded for further proceedings according to law.

By the Court.—It is so ordered.

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BATES and others. Appellants, vs. WINTERS and wife, Respondents.

March 12—March 30, 1909.

Deeds: Delivery.

Delivery of a deed by the grantor to the scrivener for the purpose of having him put it upon record and with the intention of presently passing title to the grantee was a good delivery, although the scrivener, at the grantee's suggestion, did not have the deed recorded until after the grantor's death.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This action is brought to set aside a deed from one Perry W. Winters to *Nelson W. Winters,* his stepfather, on the ground that the grantor was mentally incompetent to execute such deed and because fraud and undue influence had been used by the grantee to procure the execution and delivery thereof. It was also contended by the appellant that the deed was not delivered.

The court found (1) that Perry W. Winters died intestate January 28, 1906, leaving no widow, children, father, mother, brothers, or sisters; (2) that the plaintiffs were uncles and aunts of the decedent, and the defendant *Nelson W. Winters* was the uncle and stepfather of said decedent; (3) that the decedent was addicted to the excessive use of alcoholic liquors for several years prior to December 1, 1905, at which time he was taken with the illness that resulted in his death, and that after said 1st day of December he did not use alcoholic stimulants, and that his death was produced by cirrhosis of the liver; (4) that the decedent and said *Nelson W. Winters* were not at all times on friendly terms, but there did not appear to be any deep-seated enmity between the two, and both occupied the same home; (5) that on January 17, 1906, the decedent sent for one William Michelstetter, a

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banker at Seymour who acted as his financial agent, and that at the request of said decedent, on said date, said Michelstetter drafted a deed conveying the premises in controversy to *Nelson W. Winters,* which deed was executed by the decedent and was witnessed and acknowledged, and that at the same time the decedent assigned several mortgages to said *Nelson W. Winters;* (6) that at the time said papers were drafted the scrivener and the decedent were alone, and that after its execution the deed was taken charge of by the scrivener and was by him recorded in the office of the register of deeds on January 30, 1906, two days after Perry W. Winters died; (7) that the defendant *Winters* never received manual possession of the deed until after the same had been recorded, but that the decedent delivered the deed to the scrivener for the purpose and with the intent of having him put the same upon record, and that at said time he intended to transfer the title of the premises therein described to *Nelson W. Winters;* (8) that no adequate consideration passed to the grantor in the deed, and the only consideration therein stated was the sum of "one dollar and natural love and affection," and an alleged equitable interest that the grantor had in the property by virtue of money expended in improving the same. The dollar consideration appears from the testimony to have actually been paid; (9) that at the time of the execution of the deed Perry W. Winters was not confined to his bed, but was able to be around the house, and went upstairs twice while the scrivener was present to obtain papers from his safe, and that on the day the deed was executed said Perry W. Winters was mentally competent to execute and deliver the deed in question and that he fully comprehended at the time the purport and effect of his act, although somewhat wasted by illness resulting from the excessive use of alcoholic liquors; (10) that prior to January 17, 1906, said Michelstetter had acted as business adviser and agent for the defendant *Nelson W. Winters,* and that after the execution of the deed and

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prior to the death of Perry W. Winters said defendant requested said Michelstetter not to place the deed in question upon record until after the death of Perry W. Winters; (11) that prior to the execution of said deed said grantor appreciated the seriousness of his illness and the fact that he would live but a short time, and said deed was executed and delivered in contemplation of approaching death, and that no undue influence was exerted upon him; (12) that the decedent had never seen three of the plaintiffs, and that he had not seen the other three plaintiffs for a long period of years prior to his death, and had no correspondence or social relations with them, most of said plaintiffs residing in distant states.

On the foregoing findings of fact the court concluded as a matter of law that the complaint should be dismissed, and from a judgment entered in pursuance of the findings of fact and the conclusion of law plaintiffs appeal, and make the following assignments of error: (1) The court erred in finding that the deed in question was delivered to the scrivener for the purpose and with the intent of having the same put upon record, and in finding that the grantor named therein intended to transfer the title of the premises to *Nelson W. Winters*. (2) The court erred in finding that Perry W. Winters was mentally competent to execute and deliver the deed in question. (3) The court erred in finding that at the time the deed was executed the decedent appreciated the seriousness of his illness and the fact that he would probably live but a short time, and that said deed was executed and delivered in contemplation of approaching death. (4) The court erred in finding that no undue influence was exerted upon the decedent by reason of which he executed the deed in question. (5) The court erred in dismissing the plaintiff's complaint.

The cause was submitted for the appellants on the brief of *J. Elmer Lehr* and *Classon & Frank*.

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For the respondents there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *S. H. Cady.*

BARNES, J. There is ample testimony in the record to support the finding of the trial judge that Perry W. Winters was mentally competent to execute the deed in question and also the finding that such deed was not procured by undue influence. It is not deemed necessary to recapitulate the evidence sustaining such findings. There is nothing in the evidence which tends to show that any conditional delivery was made of the deed, or that the grantor named therein intended to reserve any control over the same after placing it in the hands of the scrivener. On the contrary, there is evidence to the effect that the deed was delivered to the scrivener for the purpose of having the same placed on record, but that at the suggestion of the grantee it was not recorded until after the grantor's death, and that the nominal consideration of one dollar named therein was in fact paid at the time of its execution. The testimony fairly shows that the possession of the deed was parted with by the grantor with the intention of presently passing title to the grantee. Under the decisions of this court in *Schumacher v. Draeger,* 137 Wis. 618, 119 N. W. 305; *Wells v. Wells,* 132 Wis. 73, 111 N. W. 1111; *Whiting v. Hoglund,* 127 Wis. 135, 138, 106 N. W. 291; *Kittoe v. Willey,* 121 Wis. 548, 552, 99 N. W. 337; and *Albright v. Albright,* 70 Wis. 528, 533, 36 N. W. 254, there was a good delivery of the deed involved in this action. The evidence in the case sustains the findings of fact made therein and the findings support the judgment.

By the Court.—Judgment affirmed.

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INDEX.

ABATEMENT AND REVIVAL.

See JUDGMENT, 5, 6.

1. A cause of action at law for deceit and fraud resulting in damages by depletion of the estate of a bank in the hands of a receiver does not survive the death of the defendant. *Allen v. Frawley*, 295

2. An application to a court of equity to revive and continue an action abated by death of a party is an appeal to judicial discretion, and should seldom be granted where unnecessary to the applicant, or when the burden cast upon the other party thereby will grievously preponderate over the benefits to the applicant, or where delay and laches have intervened so as to place the other party at serious disadvantage, and usually not where such delays have permitted a statute of limitations to run against the original demand. *Ibid.*

3. It was an abuse of judicial discretion in this case to revive in 1904, against the executrix of a defendant who died in 1902, an equitable action in which said defendant was charged with complicity in a fraud committed in 1897,—it appearing that without such revival complete justice could be done by compelling the return to a receiver of all the property which said defendant aided in wrongfully diverting from the estate of a bank (plaintiffs' debtor); that if any money judgment against said defendant was essential it might have been obtained without resort to the court of equity; that the time limited for instituting a suit upon that cause of action had run; that serious inconvenience and burden to the estate of said defendant would result; and that the plaintiffs had been guilty of laches. *Ibid.*

ABETTORS. See INDICTMENT AND INFORMATION, 1, 2. RAPE, 4, 5, 7, 9, 11, 12.

ABSENCE of defendant: When invalidates conviction. See JURY, 2.

ACCOMMODATION PAPER. See BILLS AND NOTES, 2–4.

ACCORD AND SATISFACTION.

If there was no controversy between the parties to a contract at the time they made a supplemental contract, and no settlement was then made of any existing dispute, that transaction did not constitute an accord and satisfaction. *Hicks P. Co. v. Wis. Cent. R. Co.* 584

ACCOUNT STATED.

Defendant, being indebted to plaintiff for one half of the net profits of the purchase and sale of lands after deducting expenses and "annual interest of seven per cent." on moneys advanced in the

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transaction, sent to plaintiff a statement of accounts showing his share of the profits to be a certain sum, and inclosed a check therefor. In such statement interest was compounded annually. Plaintiff acknowledged receipt of the statement without making any objection thereto, and retained and used the money. Within a short time he was informed of the fact as to the computation of interest, but not until two years and nine months after receiving the statement did he give defendant any notice that he claimed an overcharge of interest. *Held*, that he had assented to the settlement and accepted the money tendered as payment of the whole amount due him, and that, no fraud or mistake being claimed, the account so settled became conclusive on the parties. BARNES, DODGE, and KERWIN, JJ., dissent. *Ripley v. Sage L. & I. Co.* 304

ACTION.
Cause of action: Survival. See ABATEMENT AND REVIVAL, 1. JUDGMENT, 6.
By whom may be brought or maintained. See CORPORATIONS, 9–15. COURTS. EJECTMENT. TOWNS, 3.
Conditions precedent: Notice of injury. See LIMITATION OF ACTIONS.
Limitations. See ABATEMENT AND REVIVAL, 2, 3. EXECUTORS, 4. LIMITATION OF ACTIONS.
Abatement and revival. See ABATEMENT AND REVIVAL. JUDGMENT, 6.
At law or in equity? See ABATEMENT AND REVIVAL, 3.

ADMINISTRATORS. See ABATEMENT AND REVIVAL. EXECUTORS. JUDGMENT, 6. TRUSTS AND TRUSTEES.

ADMISSIONS. See TRIAL, 4.

ADVERSE POSSESSION. See APPEAL, 6.

ADVERTISING: Contract: Payment in transportation. See RAILROADS, 19, 20.

AFFIDAVITS. See DISCOVERY, 2, 3, 5–8. MOTIONS.

AFFIRMANCE of contract induced by fraud. See FRAUD, 4. SALES, 3, 4.

AGENCY. See BILLS AND NOTES, 4. CIGARETTES. CORPORATIONS, 19–21.

AIDERS AND ABETTORS. See INDICTMENT AND INFORMATION, 1, 2. RAPE, 4, 5, 7, 9, 11, 12.

ALLOWANCES to guardian *ad litem*, etc. See GUARDIANS AD LITEM. TRUSTS, 4, 5.

AMBIGUITIES. See STATUTES, 1, 2.

AMENDMENT of pleading. See PLEADING, 2–4.

ANSWER. See PLEADING, 3, 4.

APPEAL AND ERROR.

Review: Questions presented in lower court. See NEW TRIAL.

Same: New trial: Discretion.

1. Where it is plain that a new trial was granted, not in the exercise of discretion, but because of supposed error of law committed by the trial court, the supreme court, on appeal, will review the question of law so presented. *Oconto B. Co. v. Cayouette*, 664

Same: Presumptions: Questions of fact.

2. Upon appeal from a judgment entered on a directed verdict, the assumption as to matters of fact whereon the evidence was con-

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flicting must be most favorable to the appellant. *Rolling v. Wunderlich*, 667

3. Where the trial court decides and finds that a contract is not ambiguous so as to justify consideration of extrinsic evidence as to the surrounding circumstances, further so-called findings as to the intention of the parties evinced by various clauses of the contract are not findings of fact in favor of which there would be a presumption on appeal, but are merely conclusions of law reached in construing a writing from its own terms. *Western L. & C. Co. v. Copper River L. Co.* 404

Presumption as to findings of fact on matters omitted from special verdict. See TRIAL, 10.

Discretionary orders: Reversal only for abuse. See COSTS, 2. DISCOVERY, 2.

Decision as to competency of evidence, when disturbed.

4. Whether evidence of insolvency of a person at a particular date, offered to show his insolvency at an earlier date, is relevant or not, raises, primarily, a question of competency, in which field the decision of the trial court should not be disturbed on appeal unless clearly wrong. *Ellis v. State*, 513

Denial of new trial in criminal case, when not disturbed. See CRIMINAL LAW, 20.

Affirmance unless justices concur as to ground of error.

5. On appeal from a judgment, unless there is a concurrence of a majority of the participating justices in support of at least one material ground of error, the judgment must be affirmed of necessity. *Will of McNaughton*, 179

Affirmance and reversal: Material and immaterial errors. See CONTRACTS, 13, 14. CRIMINAL LAW, 7–10, 13, 14, 18, 19. HIGHWAYS, 8–10, 14, 15. JURY, 1. MINES, 6. NEGLIGENCE, 1. TRIAL, 1–5, 10.

6. In ejectment where there was not sufficient evidence to support a verdict for defendant on the defense of adverse possession, error in the charge upon that subject was harmless as to him. *Chase v. Woodruff*, 641

7. The admission of evidence as to how long plaintiff's intestate had been dead when found was harmless where there was no denial of the allegations as to the time and manner of his death. *Palmer v. Schultz*, 455

Law of the case: Decision on former appeal.

8. The decision of this court on a former appeal as to the admissibility of evidence is the law of the case on a subsequent trial and appeal. *Chase v. Woodruff*, 641

9. Where it was held on a former appeal that under the evidence at the first trial the question whether a deed was delivered was for the jury, and on the second trial the evidence to show delivery was fully as strong, a finding by the jury that the deed was delivered cannot be disturbed. *Ibid.*

Determination and disposition of cause: When new trial ordered. See CONTRACTS, 13, 14. SALES, 4.

Rehearing: Grounds: Inaccuracy not affecting result.

10. Inaccuracy in statements of fact in an opinion by this court is not ground for a rehearing where it did not affect the result. *Will of McNaughton*, 179

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Costs: Printed case violating rules. See COSTS, 3, 4.

Appeal from award of commissioners of appraisal. See RAILROADS, 10–18.

ARGUMENTS OF COUNSEL. See CRIMINAL LAW, 3, 7–10.

ARREST: Resistance. See CRIMINAL LAW, 5, 6.

ASSAULT with intent to kill. See CRIMINAL LAW, 2–4, 16, 17.

ASSESSMENT of benefits. See DRAINS, 2, 3, 5.

ASSIGNMENT.
Of notes. See BILLS AND NOTES, 3–6.
Of corporate stock. See CORPORATIONS, 3–8.
Of life insurance policy. See INSURANCE, 1–3.
Of mortgages: Recording. See MORTGAGES, 1, 2.
Of land contract. See VENDOR AND PURCHASER.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 2, 4, 5, 7.

ATTORNEY GENERAL: Refusal to bring action. See COURTS

AUDITING OFFICER. See STATES, 5.

BANKS AND BANKING

Receivers: Action for fraud. See ABATEMENT AND REVIVAL, 1, 3.

Accepting deposits when bank is "unsafe or insolvent."

1. If a person deposits in a bank for his credit a check, and it is presently treated between such person and such bank as money, the former obtaining credit upon which he may, at his pleasure, draw for money, sec. 4541, Stats. (1898), is satisfied, as regards a deposit of money. *Ellis v. State,* 513

2. A charge in an indictment or information under such section, that a particular person deposited in a specified bank, for his credit, a check on another bank and that it was received for he bank by its president, naming him, and accepted on deposit, satisfies all the essentials of such section as to an officer of a bank, in his capacity as such officer, accepting or receiving money on deposit. *Ibid.*

In case of an officer of a bank accepting for such bank money of another to be, and which is, deposited for his credit to be at his pleasure drawn on, the status of such officer as regards sec. 4541, Stats. (1898), is thereby fixed regardless of whether the depositor owes the bank on paper, due to and which does mature shortly so as to absorb the deposit, in part, before the bank is forced to suspend. *Ibid.*

4. In case of a person depositing money in a bank as against an existing overdraft, so far as it goes in discharge of such indebtedness, it is not a deposit within the meaning of sec. 4541, Stats. (1898). *Ibid.*

5. The call of the statute, as regards the act constituting a criminal fraud, is a deposit such as will create a credit; the relation of debtor and creditor between the parties, or that of bailor and bailee or that of principal and agent. *Ibid.*

6. In case officers of a bank are largely indebted thereto and possess property interests in a corporation to a very significant amount as compared to such indebtedness, and they convey such property to the bank on account of such indebtedness, pursuant to an understanding of long standing, the situation before

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the conveyance should be regarded substantially the same as that thereafter, as regards the mental state of such officers respecting the condition of the bank as to solvency. *Ibid.*

7. In the situation in the last foregoing the fact that some of the officers, equally interested in the bank and the outside property mentioned, are not debtors of the bank but have, nevertheless, agreed with their associates to join in conveying such property to strengthen it as to paper on which they were not liable, creating a moral obligation, only, to so join, which obligation the other officers have good reason to suppose will be, and in fact is, redeemed, does not militate against the outside interest of such nondebtor officers being considered by the others, before the transfer, on the question of whether the bank is solvent. *Ibid.*

8. The words "unsafe or insolvent" in sec. 4541, Stats. (1898), are used therein as legal equivalents. *Ibid.*

9. The term "unsafe or insolvent" as used in sec. 4541, Stats. (1898), does not mean insolvent in the limited sense of inability to pay indebtedness in the ordinary course of business. *Ibid.*

10. The term mentioned means insolvent in the broad general sense of a deficiency of one's assets in realizable cash available within a reasonable time, treated as an ordinarily prudent person would generally conduct his business under the same or similar circumstances, to pay his liabilities. *Ibid.*

11. A bank is unsafe or insolvent within the meaning of the statute when the cash value of its assets, realizable in a reasonable time, in case of liquidation by its proprietors as ordinarily prudent persons would ordinarily close up their business, is not equal to its liabilities, exclusive of stock liabilities. *Ibid.*

BENEFIT ASSOCIATIONS. See INSURANCE, 6–8.

BILLS AND NOTES.

Validity: Conditional delivery.

1. Where the signers of a nonnegotiable note, or some of them, were induced to sign it upon the understanding that, although it remained in the hands of the payee to obtain more signatures, it was not to be delivered so as to take effect until signed by a certain number of responsible makers, and it was not in fact so signed, it had no effect or existence as a promissory note as against the signers. *Swanke v. Herdeman,* 654

Same: Renewal: Intoxication of signer. See JUDGMENT, 2.

Consideration: Accommodation paper: Defenses.

2. No consideration moving to the accommodation maker is necessary to uphold an accommodation note, the consideration supporting his promise being that parted with by the person taking the note and received by the person accommodated. *Marling v. Jones,* 82

3. The maker of an accommodation note cannot defend against it on the ground that the holder other than the person accommodated, whether indorsee or transferee for value, knew before and when he took the note that the accommodation maker received no consideration. *Ibid.*

4. The agency of the party accommodated to negotiate an accommodation note and raise money thereon does not, in the ab-

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sence of express agreement, expire at the maturity of the note; and the mere fact that the transfer to a holder for value was made after the note became due does not permit the accommodation maker to defeat recovery at the suit of such holder merely upon the ground that there was no consideration moving to the accommodation maker. *Ibid.*

Same: Rights of assignee for value: Defenses.

5. A note and mortgage were delivered to the payee, one H., a dealer in such securities, upon his agreement to advance the money subsequently as the maker should need it for a building. The maker knew that H. was likely to transfer the securities to an innocent third person. The mortgage was recorded and H. thereupon assigned and delivered it and the note as collateral security for his own note to one who took the securities in good faith without knowledge of the agreement between H. and the maker, but the note was not indorsed so as to make the assignee a holder in due course. After the assignment H. wholly failed to make the agreed advances. *Held:*
(1) The note to H. was supported by sufficient consideration and was valid in his hands.
(2) Although the assignee of H. was not a holder in due course, protected by the law merchant, yet the maker was estopped, as against him, to set up the defense of a failure of consideration by reason of the breach of the payee's agreement. *Marling v. FitzGerald,* 93

6. The rule that a negotiable instrument in the hands of an assignee for value and without notice of defenses, if he is not a holder in due course, is subject to such defenses as were available against his assignor, relates only to such defenses as existed at the time of the assignment. *Ibid.*

Notes secured by mortgage: Unrecorded assignment: Payments to original mortgagee. See MORTGAGES.

Setoff as against non-resident, not a bona fide holder. See SETOFF AND COUNTERCLAIM, 2–5.

Evidence as to value of notes held by bank. See EVIDENCE, 11

BONA FIDE PURCHASER. See MORTGAGES, 2, 3.

BONDS: Liability of sureties. See CORPORATIONS, 19–21. PRINCIPAL AND SURETY, 2.

BRIDGES. See HIGHWAYS, 1, 2.

BUILDING CONTRACTS. See PRINCIPAL AND SURETY, 2.

CANALS: Conveyance: Lock included. See WATERS.

CANCELLATION OF INSTRUMENTS. See JURY, 3.

CARRIERS: Injuries to passengers. See RAILROADS, 21. STREET RAILWAYS, 1–3.

CAUSE OF ACTION: Survival. See ABATEMENT AND REVIVAL, 1.

CERTIORARI.

1. A finding of fact by the board of trustees of the policemen's pension fund of a city, made within the jurisdiction of the board and upon evidence before it, cannot be reversed on *certiorari*. *State ex rel. McManus v. Trustees,* 133

2. Upon *certiorari* to review proceedings of a *quasi*-judicial body involving matters of fact determinable upon evidence, formal

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findings of fact and conclusions of law are not necessary, the theory of the proceeding being that the evidence reasonably admits of a finding but one way, and that contrary findings are errors of law and jurisdictional. *State ex rel. Pittsburgh Coal Co. v. Patterson*, 475.

CHANGE OF BENEFICIARY. See INSURANCE, 1–4, 6.

CIGARETTES.

1. The sale, by a retail merchant in this state, of a sealed package of tobacco, purchased from a wholesaler in the regular course of business, containing a coupon stating that a certain foreign corporation would send a specified quantity of cigarette paper to any one transmitting to it by mail three of such coupons, is a violation by such retailer of sec. 1, ch. 82, Laws of 1905, which prohibits any person "by himself, his servant or agent, or as the servant or agent of any other person, directly or indirectly, or upon any pretense, or by any device," from selling, giving away, or otherwise disposing of any cigarette paper. *State v. Sbragia*, 579.

2. The retailer in such a case is the principal in the sense that a sale of the package includes the sale of a coupon, and an agent in the sense that he acts for the foreign dealer in the latter's effort to supply customers in this state with cigarette paper. *Ibid.*

3. Such a sale does not involve any question of interstate commerce. *Ibid.*

CLAIMS against decedents. See EXECUTORS, 4.

CLASSIFICATION for legislative purposes. See CONSTITUTIONAL LAW, 5, 6. RAILROADS, 1–4.

CO-EMPLOYEES: Negligence. See MASTER AND SERVANT, 8–10. RAILROADS, 1–9, 24.

COGNOVIT. See JUDGMENT, 2, 3.

COLLATERAL SECURITY. See BILLS AND NOTES, 5. CORPORATIONS, 3–8.

COMITY. See CONTRACTS, 1. TELEGRAPHS.

COMMERCE. See CIGARETTES, 3. CORPORATIONS, 21. RAILROADS, 9.

COMMITTEES of legislature: Investigations: Incurring expenses. See STATES.

COMMON CARRIERS. See RAILROADS, 21. STREET RAILWAYS, 1–3.

COMPARATIVE NEGLIGENCE. See RAILROADS, 7.

CONDEMNATION OF LAND. See RAILROADS, 10–18.

CONDITIONS.
Precedent to action. See LIMITATION OF ACTIONS.
Subsequent. See VENDOR AND PURCHASER, 4–6.

CONFESSION OF JUDGMENT. See JUDGMENT, 2, 3.

CONFLICT OF LAWS. See CONTRACTS, 1. TELEGRAPHS.

CONSIDERATION. See BILLS AND NOTES, 2–5. MORTGAGES, 2.

CONSPIRACY. See CRIMINAL LAW, 2–4.

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CONSTITUTIONAL LAW.

Legislative powers: Investigations, etc. See STATES.

Same: Salaries of public officers: Change during term. See JUDGES. OFFICERS.

Same: Election of U. S. senators: Discretion: Primary election laws. See ELECTIONS.

Validity of statutes, when considered by courts.

1. The constitutionality of a legislative act will not be considered by the court unless a decision in respect thereto is essential to the determination of some controversy calling for judicial solution. *State ex rel. Rosenhein v. Frear,* 173

Judicial power: Vesting in bodies other than courts: Legislative committees. See STATES, 7.

Same: Vesting in juries. See RAILROADS, 5.

Judges: Term of office: Change of salary. See JUDGES. OFFICERS.

Police power: Regulation of railroads: Liability to employees. See RAILROADS, 1–9.

Drainage laws: Validity. See DRAINS, 1.

Right of public assembly, etc.: Infringement by primary election law. See ELECTIONS.

Liberty of contract. See RAILROADS, 8.

Vested rights: Remedies: Rules of evidence: Competency of witnesses.

2. One cannot acquire a vested right in a judicial remedy unless it is of the contract so that an invasion of the remedy necessarily impairs the property right. *Will of McNaughton,* 179

3. The exception noted does not apply to a mere rule of evidence which leaves other rules, ample to establish the remedial right by competent witnesses. *Ibid.*

4. It is competent for the legislature to prescribe a rule of evidence as by ch. 197, Laws of 1907, applicable to transactions which happened prior to the enactment, but incompetency of a witness resulting may be avoided by removal of the condition upon which it is based before the person affected is offered as a witness. *Ibid.*

Obligation of contracts: Impairing. See CONSTITUTIONAL LAW, 2, 3.

Equal protection of the laws: Classification. See CORPORATIONS, 2. WITNESSES, 5.

5. The rule of equality before the law does not preclude classification for legislative purposes, if the classification is not arbitrary but is based upon substantial distinctions, is germane to the purpose of the law, is not based on existing circumstances only so that there can be no change in the membership of a class, and provided the law applies equally to all members of each class. *Kiley v. C., M. & St. P. R. Co.* 215

6. The necessity and propriety of such classification are to be determined by the legislature, and if made in conformity with the rules above mentioned it cannot be disturbed by the courts.

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Same: Regulation of railroads: Liability to employees. See RAILROADS, 1–9.

Due process of law. See CORPORATIONS, 2. RAILROADS, 2, 7

CONTINGENT FUTURE ESTATES. See WILLS, 3.

CONTRACTS.

See BILLS AND NOTES. DEEDS. INSURANCE. PRINCIPAL AND SURETY. SALES. VENDOR AND PURCHASER.

Right to liberty of contract. See RAILROADS, 8.

Impairing obligation. See CONSTITUTIONAL LAW, 2, 3.

Validity: Lex loci: Comity: Public policy. See TELEGRAPHS.

1. Though it is a general rule that the *lex loci* governs as to the validity of a contract, yet comity does not require recognition or enforcement, either as a basis of attack or defense, of a contract which, though valid under the *lex loci*, contravenes the public policy of the state in which such recognition or enforcement is sought. *Fox v. Postal T.-C. Co.* 648

Same: Executed contracts.

2. A contract which is not enforceable while executory because of want of mutuality becomes valid when executed. *Oconto B. Co. v. Cayouette,* 664

3. A contract whereby a brewing company, to induce a saloonkeeper to sell its beer, agreed to erect a beer depot in the city and deliver its beer therefrom every morning, and that until such depot was built he was not to pay for the beer furnished to him, is valid after performance by the saloonkeeper and, the company having failed to build the beer depot, is a complete defense to an action for the value of the beer furnished. *Ibid.*

Same: Unlicensed foreign corporations. See CORPORATIONS, 19–21.

Oral negotiations preceding writing. See EVIDENCE, 12.

Construction. See APPEAL, 3. EVIDENCE, 7. RAILROADS, 19.

4. Written provisions inserted in a printed form of contract are to control if they cannot be reconciled with the printed portions. *Hicks P. Co. v. Wis. Cent. R. Co.* 584

5. The practical construction of a contract by the parties acting under it is entitled to much weight. *Ibid.*

6. Where a contract is fairly open to two constructions, by one of which it would be lawful, while by the other it would be unlawful and one party would be subjected to a forfeiture, the former construction should be adopted. *Ibid.*

7. A contract by which the publisher of a newspaper agreed to publish, during the year 1906, the advertising matter furnished by a railway company, "to be charged at regular rates to the amount of $400," "in full consideration of" which the company agreed "to issue in payment $400 worth of transportation," is construed—in view of ch. 362, Laws of 1905,—as entitling the publisher to charge the full value of advertising in excess of what was paid for in transportation, although late in the year, stating that much more advertising had been given than the contract called for, the publisher asked the company as a favor for $50 worth of additional transportation and a supplemental contract was made accordingly. *Ibid.*

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Supplemental contract: When making it does not constitute accord and satisfaction. See ACCORD AND SATISFACTION.

Performance: Modification: Waiver. See INSURANCE, 5.

8. Where, by a failure of some exact performance, a forfeiture is imposed on one party by the strict terms of an agreement, conduct of the other party sufficient to induce a belief that a modified performance is satisfactory and will be accepted as equivalent to strict performance will justify a conclusion that the parties have assented to a modification of the original terms or that the obligee has waived strict performance. *Seidel v. Equitable L. A. Soc.* 66

Rescission for fraud, etc. See DISCOVERY, 7. FRAUD, 4. JUDGMENT, 8. SALES, 3–7.

9. Where there is no doubt as to the subject matter, the mere fact that one party has in fact sold more than he thought he was selling, or the other got more than he expected, is not sufficient to avoid the contract of sale; but where there is a mutual mistake as to the subject matter, that condition is sufficient to avoid the contract. *Moehlenpah v. Mayhew,* 561

10. Where the subject matter of a sale, and what both parties supposed they were dealing with, was a right in remainder subject to a life estate and subject further to be partially or wholly used for maintenance of the life tenant, but by reason of the prior death of such tenant, then unknown to either party, they were in fact buying and selling an absolute estate or right immediately available in possession and ownership and not subject to diminution, there was a mutual mistake of fact such as would avoid the contract unless the party seeking relief was negligent in making the contract or acquiesced therein after learning of the mistake. *Ibid.*

11. The facts stated in the complaint must show a case of fraud and mistake, or fraud or mistake, in order to entitle plaintiff to relief upon either ground which the evidence may establish. *Ibid.*

12. A party asking rescission or cancellation of a contract must bring forward all his grounds therefor in one suit, and cannot have his right or claim tried by piecemeal. *Ibid.*

13. In an action to rescind a contract on the ground of fraud the findings negatived the fraud, but a further material and relevant finding clearly established a mutual mistake of fact such as, if properly pleaded, would have entitled plaintiff to relief in the absence of negligence or acquiescence. *Held,* that a judgment for defendant on such findings would, if allowed to stand, be an adjudication that, notwithstanding such mistake, the contract is valid and binding upon the parties. *Ibid.*

14. In such case, the findings being supported by the evidence, the supreme court reverses the judgment and remands the cause for trial, upon supplemental complaint and answer, of the questions relating to negligence in making the contract or acquiescence therein after discovery of the mistake. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 2, 3. RAILROADS, 5–7, 21–23. STREET RAILWAYS, 4, 5.

CONVERSION of personal property. See CORPORATIONS, 9, 10. TROVER AND CONVERSION.

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CONVEYANCES. See APPEAL, 9. DEEDS. EJECTMENT, 2. EXECUTION, 2. MORTGAGES, 2, 3. PLEADING, 2. TOWNS, 1, 2. VENDOR AND PURCHASER. WATERS. WILLS, 1, 2.

CORPORATIONS.

How far are separate entities. See CRIMINAL LAW, 1. EMBEZZLEMENT.

1. A corporation exists only in contemplation of law, and the legal fiction that it is a separate entity, though necessary for many purposes, cannot be urged to an intent and purpose not within the reason and policy of that fiction. *Milbrath v. State,* 354

Are "persons:" Constitutional rights.

2. Corporations are entitled to the same protection as individuals under the constitutional guaranties of liberty and equality, and are "persons," within the meaning of the XIVth amendment, Const. of U. S., providing that no state shall deprive any person of property without due process of law or deny to any person the equal protection of the laws. *Kiley v. C., M. & St. P. R. Co.* 215

Stock: Subscription induced by fraud. See DISCOVERY, 6–8.

Same: Purchase induced by fraud. See FRAUD, 3–7.

Same: Conversion. See TROVER AND CONVERSION.

Same: Assignment as collateral security: Right to vote, etc.

3. In an action involving the right to vote corporate stock assigned as collateral security for notes given for its purchase price, it is *held,* upon the evidence, that by the understanding and agreement of the parties the pledgor has the right to vote the stock, although it was not expressly so stipulated in their written contract. *Goetzinger v. Donahue,* 103

[4. Whether, in general, the right to vote corporate stock assigned as collateral security is in the pledgor or the pledgee, not determined.] *Ibid.*

5. Upon the sale of all the stock of a corporation notes were given for a part of the purchase price and most of the stock was assigned to the vendor as collateral security therefor. One share was issued to him and it was agreed that he should be a director, officer, and employee of the company, so as to be in a position to protect his securities. *Held,* that he was entitled to have the stock so pledged transferred to him on the books of the company, and that a new certificate should be issued to him showing the transfer and that it issued pursuant to the judgment of the court. *Ibid.*

6. The assignment of the stock as collateral in such case being made, under the agreement, "to secure the payment of said notes, the same to be held by the [payee] until said notes shall be fully paid," no part of the pledged stock need be surrendered until the indebtedness evidenced by the notes is fully paid. *Ibid.*

7. There being nothing in the agreement warranting an inference that the stock was pledged to secure anything other than the notes mentioned, the pledgee was not entitled to hold it to secure payment of damages by reason of a breach of his agreement in respect to his being retained as a director and officer of the company. *Ibid.*

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8. In an action for determination of the rights of all parties under such sale and agreement, the judgment should provide for the continuance of the vendor and pledgee of the stock as a director, officer, and employee of the company until the debt to him should be paid, upon the condition that he perform the duties of such positions; and his interest in the property should be protected against transfers or other acts of the corporation which might improperly impair his security. *Ibid.*

Stockholders: Right to sue for wrong to corporation: Parties: Pleading.

9. The wrongful taking and conversion by an officer of a corporation of moneys and property belonging to it is primarily a wrong to the corporation and it has the primary right to bring an action therefor. *Elmergreen v. Weimer,* 112

10. If, in such case, the corporation fails to sue, it is a necessary party defendant in an action brought by a stockholder. *Ibid.*

11. Assuming that an allegation that a corporation has been dissolved is sufficient on demurrer, a further averment that it has "no legal existence at the present time" states merely a conclusion of law, which is not admitted by the demurrer. *Ibid.*

12. In the absence of allegations to the contrary it will be presumed on demurrer that the laws of another state with respect to corporations organized therein provide—like our sec. 1764, Stats. (1898)—that after such corporations are dissolved they shall continue for three years to be bodies corporate for the purpose of prosecuting and defending actions and of enabling them to settle and close up their business, etc. *Ibid.*

13. Before a stockholder can bring an action for a wrong to a corporation which, though dissolved, still exists for the purpose of prosecuting and defending actions, he must show a demand upon the corporation to bring the suit or some sufficient reason for failure to make such demand. *Ibid.*

14. An allegation that plaintiff was a stockholder in a corporation when it was dissolved does not show that he was a stockholder when the action was commenced, some eighteen months thereafter. *Ibid.*

15. An allegation that defendant controlled and dominated a corporation "up to the time of the dissolution thereof" does not show that he continued to dominate and control it thereafter, so as to excuse plaintiff's failure to demand that the corporation itself bring the action to remedy a wrong done to it by defendant. It cannot be presumed that after the dissolution defendant dominated or interfered with the winding up of the corporation as provided by law. *Ibid.*

Officers: Resignation: When vacates office.

16. Even where the charter of a corporation provides that its officers shall hold until their successors are elected and qualified, or appointed and qualified, the resignation of an officer without any acceptance thereof vacates the office for all general purposes unless acceptance is specially required by the charter. *Will of McNaughton,* 179

Same: Responsibility for crime. See CRIMINAL LAW, 1. EMBEZZLEMENT.

Same: Receiving deposits in insolvent bank: Knowledge. See BANKS AND BANKING, 2, 3, 6, 7.

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Same: Competency as witnesses. See WITNESSES, 1.

Agents and employees: Examination as adverse witnesses. See WITNESSES, 4, 5.

Dissolution. See CORPORATIONS, 11–15.

Eleemosynary corporations: Veterans' Home: Discharge of inmate.

17. Corporations organized for purposes akin to that for which the Board of Trustees of the Wisconsin Veterans' Home was organized have the right to prescribe reasonable rules governing the admission and discharge of inmates; and under sec. 1785, Stats. (1898), the proper officers may at any time discharge any such inmate when, in their judgment, it shall be for his interests or the interests of the corporation. *Smith v. Board of Trustees,* 628

18. In an action against said corporation for damages for a wrongful discharge from the Home, it is *held* that a verdict was properly directed for defendant,—it appearing that the board of trustees had proceeded regularly, within its statutory powers, and in accordance with its by-laws, rules, and regulations in discharging plaintiff because of misconduct in circulating false and scandalous reports concerning officials of the Home, to the detriment of the institution. *Ibid.*

Foreign corporations: Validity of contracts, etc.: Bond of agent.

19. In an action upon an agent's bond, where the answer denied the corporate existence of plaintiff and alleged that it held itself out to be a foreign corporation, a further allegation that it had transacted business in this state under the contract in question in violation of sec. 1770*b*, Stats. (1898), did not show that the contract was void, since said section does not apply to cases of mere representation. *Sanitas Co. v. Niezorawski,* 377

20. Defendant might, however, prevail upon the defense so attempted to be pleaded, where the court found as a fact that plaintiff was a foreign corporation, and such finding was not excepted to. *Ibid.*

21. Where goods are sold outright by a foreign corporation to a so-called agent in this state the transaction is interstate commerce, not affected by sec. 1770*b*, Stats. (1898), but as to any indebtedness of the purchaser on such sales there is no liability on the part of the surety on a bond conditioned that such purchaser should "well and truly perform the duties of agent" for the foreign corporation, and pay over to it all moneys received by him "as such agent." *Ibid.*

CORROBORATION. See RAPE, 2.

COSTS.

1. Generally, in a contest between legatees to establish their rights under a will, costs should be awarded to the successful party. *Moore v. Moore,* 602

2. The fact that plaintiff was able to furnish the required security shows that there was no abuse of discretion in an order requiring him to give security for costs; and in the absence of such abuse the order should not be reversed. *Smith v. Board of Trustees,* 628

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3. No costs are allowed for the printing of a case which contains the whole testimony *in extenso*, in violation of Supreme Court Rule 6. *Swanke v. Herdeman*, 654

4. Same point. See *Neale v. State*, 491, 493

5. Costs and expenses, when payable out of trust funds. See *Will of McNaughton*, 179

COUNTERCLAIM. See SETOFF AND COUNTERCLAIM.

COURTS.

Supreme court: Original jurisdiction.

The supreme court, in the exercise of its original jurisdiction, may entertain an equitable action to prevent the secretary of state and state treasurer from disbursing state moneys for illegitimate purposes; and such action may be initiated by a taxpayer if the attorney general refuses to act. *State ex rel. Rosenhein v. Frear*, 173

Same: Concurrence of majority as to ground of error. See APPEAL, 5.

Same: Salaries of justices. See JUDGES. OFFICERS.

When courts will consider constitutionality of statute. See CONSTITUTIONAL LAW, 1.

Comity. See CONTRACTS, 1. TELEGRAPHS.

Judicial power: Where vested. See RAILROADS, 5, 6. STATES.

CRIMINAL LAW AND PRACTICE.

See BANKS AND BANKING. CIGARETTES. EMBEZZLEMENT. INDICTMENT AND INFORMATION. JURY. RAPE.

Responsibility for crime: Acts done as officer of corporation.

1. A person charged with a crime will not be heard to say in justification that he committed the act in his official capacity as officer of a corporation; nor to assert that acts in form corporate acts were not his acts merely because done by him through the instrumentality of a corporation which he controlled and dominated in all respects and which he employed for that purpose. *Milbrath v. State*, 354

Evidence: Materiality and competency. See EMBEZZLEMENT, 3.

2. If two persons assault another with design to feloniously take that other's life, and the claim of the prosecution is that such persons acted pursuant to a conspiracy, having for its purpose the offense attempted in aid of a further general purpose, and only one is placed on trial who denies being one of the two, and the identity of the other is established—all the circumstances of the conspiracy, and the various steps in its consummation tending to show motive for participation therein of the one on trial and to identify him as having been the participant and the general intent of such participation, may properly be given in evidence. *Weisenbach v. State*, 152

3. In the situation mentioned it is proper to state to the jury in opening the case on the part of the prosecution all facts the state expects to prove, as to the existence of the conspiracy, the connection of the accused therewith, particularly at the time of the offense, and to offer all legitimate evidence showing such

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circumstances, so far as they tend to establish guilt of the accused. *Ibid.*

4. In such a situation, the fact that one participant has not been apprehended, does not militate, upon the trial of the other, against showing all the facts regarding the absent one bearing on the criminality of such other. *Ibid.*

5. If a person, about to be apprehended as guilty of having committed a criminal offense, resists arrest, that may properly be established upon his trial as bearing on the probability of his guilt and given such weight by the jury as they may think it is entitled to under all circumstances. *Ibid.*

6. If an attempt be made to arrest a person upon a charge of his having committed a criminal offense, and he successfully, by threats or intimidation, prevents being apprehended, and is informed that he will be visited later by a force sufficient to secure his submission, and he evinces a disposition to resist in such event, and upon a new attempt the officers are resisted by such person and a comrade, acting in concert with him, and to the extent of a claimed design to take the lives of such officers,—proof of the previous occurrence and threats are legitimate as to the intent of such resistance. *Ibid.*

Same: Res gestæ. See RAPE, 10.

Trial: Arguments of counsel. See CRIMINAL LAW, 3.

7. A misstatement by the district attorney, in his argument to the jury, as to the time within which admitted acts of intercourse by defendants with the prosecutrix occurred, is *held* to have been harmless, in view of the trial court's direction to the jury to recall the testimony and not take counsel's statement on either side for what it was. *Vogel v. State,* 315

8. Language used by the district attorney in his argument to the jury, characterizing a witness as a "disreputable, dirty pup of a liar," is disapproved, but it was proper for him to comment upon the contradictory statements which the witness admitted having made, for the purpose of impeaching his credibility. *Ibid.*

9. Statements by the district attorney, in his argument to the jury, that if the prosecutrix "was your or my girl, you wouldn't have waited to have a trial in court," and that "the people of the country are watching this case, and when they have another case like this they will have a lynching bee," are *held* improper and reprehensible, but not so prejudicial as to work a reversal of the conviction, where the trial court told the jury that such remarks were improper and admonished them to decide the case according to the evidence and to acquit the defendants, without regard to any other case or to the future, unless their guilt was established beyond a reasonable doubt. *Ibid.*

10. Considerable latitude must be allowed counsel in arguing cases, and a judgment should not be reversed because of improper remarks unless this court is satisfied that the jury was not sufficiently instructed to disregard them or they appear to be so flagrant that they must have been prejudicial notwithstanding any admonition that may have been given by the trial court. *Ibid.*

Instructions to jury. See EMBEZZLEMENT, 4, 5.

11. If a person is charged with a homicidal offense of a high degree, including lesser degrees, the case need not be submitted to the

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jury in any aspect other than such as there is evidence in some reasonable view to sustain. *Weisenbach v. State,* 152

12. In the trial of a person accused of having committed a homicidal offense of a character including a lesser offense, the court should instruct the jury as to every offense included in the charge established in any reasonable view by the evidence. *Ibid.*

13. In the circumstances last mentioned, failure to charge as to any particular grade of offense, no proper request being submitted therefor, is not harmful error. *Ibid.*

14. In such circumstances, an instruction requiring conviction of the higher degree or acquittal, is favorable rather than harmful to the accused. *Ibid.*

15. A requested instruction, embodying a correct rule of law but not applicable to the facts of the case, may properly be refused. *Ibid.*

16. In submitting a cause to a jury involving a charge of assault with a dangerous weapon with felonious intent to take human life it is proper to instruct the jury that a man is presumed to intend the natural, probable, and usual consequences of his act, that being given so as to indicate it is not conclusive; only an evidentiary circumstance, to be considered in connection with the legal presumption of innocence and all the evidence bearing on the issue. *Ibid.*

17. The fact that, in the given case, the reasonably to be expected result, as the usual and probable consequences of the act charged, did not occur, does not preclude giving to the jury the rule as to the inference of fact arising from the deliberate act. *Ibid.*

18. Refusal to instruct the jury that, under the information charging rape, defendants not guilty of that offense might be found guilty of assault and battery, was not error prejudicial to the defendants. *Vogel v. State,* 315

19. It is not error to refuse requested instructions which are adequately and fairly covered in the general charge or which relate to mere evidentiary matters. *Ibid.*

Appeal and error: Refusal of new trial, when not disturbed.

20. The refusal of the trial court to grant a new trial on the ground that the evidence is insufficient to support a conviction will not be disturbed by this court where the record contains evidence from which the guilt of the accused can fairly be deduced. *Vogel v. State,* 315

Same: Harmless errors. See JURY.

CROSS-EXAMINATION. See WITNESSES, 4, 5.

DAMAGES.

See DEATH. NEW TRIAL. RAILROADS, 11–18.

In an action for injuries to a passenger on a street car who was alleged to have suffered concussion of the spine, nervous shock, etc., it being found by the jury that plaintiff was not permanently injured, an award of $3,000 damages is *held* excessive. *Gay v. Milwaukee E. R. & L. Co.* 348

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DEATH.

Death caused by negligence. See ELECTRICITY. PLEADING, 4.

Same: Damages: Evidence.

1. In fixing a widow's damages for death of her husband the jury may include the value of her support and protection by him during the time he would probably have lived, and may consider the addition that his earnings would probably have made to his property, and her reasonable expectation of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs. *Ryan v. Oshkosh G. L. Co.* 466
2. An award of $7,000 for death of plaintiff's husband, forty-six years old, a good business man, thrifty and industrious, who had accumulated an estate of $7,000, is *held* not excessive. *Ibid.*
3. In an action for death of plaintiff's husband the admission of evidence as to the official position which he had held, and that at one time he had attended college to better qualify himself for business, was not error. *Ibid.*
4. It appearing that deceased was running a truck farm, raising berries and fruits, and that it was a profitable business, it was not error to permit a witness to state what would be "the average annual earning from an acre of strawberries, fairly cultivated and raised in that vicinity." The objection that it had not been shown how deceased cultivated his berries, the variety he raised, or the character of his soil, etc., went rather to the weight of such testimony than to its competency. *Ibid.*

Same: Evidence as to how long person had been dead when found. See APPEAL, 7. EVIDENCE, 13.

Death of party: Effect. See ABATEMENT AND REVIVAL. JUDGMENT, 1, 5, 6.

DEBTOR AND CREDITOR. See ACCOUNT STATED. BANKS AND BANKING, 5–11. CORPORATIONS, 5–8. EVIDENCE, 4–7. EXECUTION. EXECUTORS, 4. MORTGAGES. PRINCIPAL AND SURETY. SETOFF AND COUNTERCLAIM.

DECEIT. See ABATEMENT AND REVIVAL, 1, 3. FRAUD.

DEDICATION. See HIGHWAYS, 9, 10.

DEEDS

See APPEAL, 9. EJECTMENT, 2. EXECUTION, 2. MORTGAGES, 2, 3. PLEADING, 2. VENDOR AND PURCHASER, 1–3. WATERS. WILLS, 1, 2. WITNESSES, 2.

Delivery of a deed by the grantor to the scrivener for the purpose of having him put it upon record and with the intention of presently passing title to the grantee was a good delivery, although the scrivener, at the grantee's suggestion, did not have the deed recorded until after the grantor's death. *Bates v. Winters,* 673

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See ABATEMENT AND REVIVAL, 2, 3. ACCOUNT STATED. FRAUD, 4. SALES, 6.

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DELIVERY.
Of promissory note: Conditions. See BILLS AND NOTES, 1.
Of deed. See APPEAL, 9. DEEDS. PLEADING, 2. WILLS, 2. WITNESSES, 2.
Of goods sold. See SALES, 1, 2.

DEMAND: When necessary. See CORPORATIONS, 13, 15. EMBEZZLEMENT, 6.

DEMURRER: Relating back. See DRAINS, 4. MANDAMUS, 8

DEPOSITIONS. See DISCOVERY.

DEPOSITS: Receiving when bank is insolvent. See BANKS AND BANKING.

DISCOVERY.

1. If a party is entitled to the examination authorized by sec. 4096, Stats. (Supp. 1906), to enable him to plead, it should be allowed without reference to his ulterior motives, his good faith or bad faith; the court having ample power to protect the opposite party against unnecessary or improper examination. *Ellinger v. Equitable L. A. Soc.* 390
2. The affidavit of the party seeking such examination is not conclusive upon the trial court as to the matters necessary to enable him to plead; and such court may in its discretion limit the subjects to which the examination shall extend or may forbid the examination entirely, and its decision will not be disturbed unless there was an abuse of discretion. *Ibid.*
3. In an action to recover the amount due on a matured semi-tontine life insurance policy, including the surplus or profits which should equitably be apportioned thereto, plaintiff sought to examine defendant's actuary, under sec. 4096, Stats. (Supp. 1906), in order to enable plaintiff to plead. It appearing from plaintiff's affidavit that he had had inspection of defendant's books showing the whole number of such policies issued, the amount and items thereof, the total premiums, the forfeitures by lapse, and the total payments of expenses and benefits, it is *held* that the proposed examination is unnecessary, since plaintiff has sufficient information to enable him to frame his complaint, claiming a specific sum. *Ibid.*
4. The plaintiff in such case may, if he so elect, plead by claiming an indeterminate or indefinite sum approximating a stated amount, and cast the burden upon the defendant to account for the surplus and profits promised by the contract of insurance. *Ibid.*
5. Under sec. 4096, Stats. (Supp. 1906), authorizing examination of an adverse party to enable plaintiff to frame his complaint upon an affidavit stating "the general nature and object of the action," etc., the affidavit need not state facts constituting a cause of action, but is sufficient if the facts stated show that plaintiff may be entitled to recover. *Heckendorn v. Romadka*, 416
6. An affidavit stating that plaintiff subscribed and paid cash to the defendant corporation for certain shares of its stock; that defendant R. was an officer of the company and owned a controlling interest therein; that he and the officers and representatives of the company managed its affairs, and as such fraudulently misrepresented its financial condition and the

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value and productiveness of its property, and thereby induced plaintiff to subscribe for and purchase said shares; and that R. finally, through fraud, secured title and possession of all the company's property and assets,—is *held* to show that plaintiff has a cause of action against the defendants for fraud committed by them jointly. *Ibid.*

7. Plaintiff has in such a case the right to pursue any one of several courses to remedy the wrong; and a statement in his affidavit under sec. 4096, Stats. (Supp. 1906), that the general nature and object of the action is for a rescission of the subscription contract and for the recovery of the money paid, does not constitute an election of remedy so as to limit him in the framing of the complaint after he has learned the details of the transactions through the proposed examination. *Ibid.*

8. The statement in plaintiff's affidavit that the defendant R., as stockholder and director, and through his sons, who were also directors, controlled the corporate property and affairs and so manipulated them as to secure possession of all the property and assets of the company, justifies a claim that he as well as the company may be found to have received plaintiff's property through their joint wrong and may therefore be chargeable as a trustee for the plaintiff. *Ibid.*

DISCRETION.
Of court. See ABATEMENT AND REVIVAL, 2, 3. APPEAL, 1. COSTS, 2. DISCOVERY, 2, 3. GUARDIANS AD LITEM, 2, 6. PLEADING.
Of legislature. See RAILROADS, 4, 7, 8. STATES.
Of public officer. See MANDAMUS, 4.

DISTRICT ATTORNEY. See CRIMINAL LAW, 3, 7–10.

DIVORCE. See INSURANCE, 7.

DRAINS.

1. The drainage laws can be sustained only by reason of the public nature of the enterprise and the actual benefits accruing to the persons taxed. *Remington Drainage District*, 621

2. Sec. 10, ch. 419, Laws of 1905 (sec. 1379—20, Stats.: Supp. 1906), does not, in view of other provisions of the chapter, authorize a new assessment of benefits by supplemental report or petition of the drainage commissioners, but relates merely to the correction of insubstantial errors in the proceedings not going to jurisdiction over the subject matter. *Ibid.*

[3. Whether the first assessment of benefits in drainage proceedings is final and conclusive for all time, except as qualified by sec. 39, ch. 419, Laws of 1905 (sec. 1379—31*r*, Stats.: Supp. 1906), and whether said sec. 39 is valid, not determined.] *Ibid.*

4. A demurrer to the remonstrance against the granting of a petition in drainage proceedings relates back to the petition and raises the question of its sufficiency. *Ibid.*

5. A landowner signed the original petition for the construction of a drain; was chargeable with knowledge of the proceedings in the laying out thereof and the apportionment of the cost to the persons benefited; had notice in fact of the assessment upon his property before the letting of the contract for the work; and did not appeal from such assessment but permitted the contractor to do the work in reliance upon the assessment as unassailed. His lands were benefited by the drain to an amount

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at least equal to the assessment. In an action to restrain collection of that or any other assessment against his lands on account of such drain he made no offer to pay any sum. *Held*, that the action should be dismissed for laches and want of equity. *Cotzhausen v. Dick*, 127

DUE PROCESS OF LAW. See CORPORATIONS, 2. RAILROADS, 2, 7.

DUPLICATION of damages for taking of land. See RAILROADS, 15–17.

EASEMENTS. See RAILROADS, 18. WATERS, 3.

EJECTMENT.

See APPEAL, 6.

1. Legal title or estate, or immediate legal right to possession, are essential prerequisites to the maintenance of an action of ejectment. *Wilburn v. Land*, 36

2. A conveyance by a married man of his homestead without the signature of his wife, even if it might, under sec. 2203, Stats. (1898), be effective as a contract to convey, did not vest in the grantee either legal title or right to possession such as would enable him to maintain ejectment. *Ibid.*

ELECTION.

Between remedies. See DISCOVERY, 7. FRAUD, 4, 6. SALES, 3, 4, 6, 7.

To take different or lesser estate than that condemned. See RAILROADS, 11.

As to particular act relied upon. See RAPE, 8.

ELECTIONS.

Primary election law: Validity.

Whether the primary election law (secs. 11—1 to 11—28, Stats.) so affects the discretion of members of the legislature, under the federal constitution, respecting the election of United States senators as to be invalid, and whether it infringes the right of public assembly and consultation for the public good, guaranteed by sec. 4, art. I, of the state constitution, not determined. *State ex rel. Rosenhein v. Frear*, 173

Same: Investigation as to workings and policy. See STATES, 2, 3.

Town elections: Notices. See TOWNS, 2.

ELECTRICITY.

1. In an action for death of one who was killed by coming in contact with a guy wire charged with electricity, the special verdict is *held* fairly to cover the issuable facts without further submission of more specific questions as to defendant's negligence. *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, distinguished. *Ryan v. Oshkosh G. L. Co.* 466

2. A finding in such case that the defect had existed for such length of time that defendant, in the exercise of ordinary care, ought to have known and remedied it, is *held* to be sustained by the evidence. *Ibid.*

3. The important question in such case was, not when the contact took place whereby the current passed into the guy wire, but when the wires became displaced so as to permit a contact to occur. *Ibid.*

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4. *Quære* whether, upon the facts of the case, defendant was not guilty of negligence as matter of law in failing to use some proper appliance which, in the event of defect or contact of wires, would prevent the passage of the current to the guy wire. *Ibid.*

ELEEMOSYNARY CORPORATIONS: Discharge of inmate of Veterans' Home. See CORPORATIONS, 17, 18.

EMBEZZLEMENT.

1. One may convert money of another to his own use by putting it into the treasury and mingling it with the funds of an insolvent corporation which is under his control and management and of which he is a stockholder and officer in charge; and the fact that the benefit which he receives is not equal to the whole amount of the money is not material. *Milbrath v. State*, 354

2. A corporation organized by defendant and to which he turned over his loan business is *held* in this case to have been a mere instrumentality through which he embezzled and converted to his own use moneys paid in to the corporation upon a loan which he had made for a client. *Ibid.*

3. On the trial of the defendant for such embezzlement, evidence as to the organization, management, control, manner of doing business, and insolvency of the corporation was admissible. *Ibid.*

4. It was not error in such case to charge the jury that the payments of interest to the owner after the principal had been paid in to the corporation were made by the defendant; nor to charge, as to the defendant and the secretary of the corporation who received the money when it was paid in, that they and each of them held it in trust for the owner. *Ibid.*

5. Nor, in view of the uncontradicted evidence, was it error to charge the jury that it was not disputed that the owner of the money in question lost it by fraud; but this portion of the charge is not approved. *Ibid.*

6. Under the circumstances above stated, the fact that the money had been paid in to the corporation not being known to the owner until after the bankruptcy of the corporation, when demand therefor would have been useless, it is immaterial that no demand for the money was made upon the defendant before the prosecution. *Ibid.*

EMINENT DOMAIN. See RAILROADS, 10–18.

EMPLOYER'S LIABILITY. See MASTER AND SERVANT. RAILROADS, 1–9, 24.

ENCROACHMENTS. See HIGHWAYS, 5.

EQUAL PROTECTION OF THE LAWS. See CONSTITUTIONAL LAW, 5, 6. CORPORATIONS, 2. WITNESSES, 5.

EQUITY. See ABATEMENT AND REVIVAL, 2, 3. CONTRACTS, 9–14. CORPORATIONS, 3–8. COURTS. DISCOVERY. DRAINS, 5. ESTOPPEL. JUDGMENT, 2, 3, 10–13. JURY, 3. PLEADING, 2. PRINCIPAL AND SURETY. SETOFF AND COUNTERCLAIM. TRUSTS AND TRUSTEES.

ESTATES in land. See RAILROADS, 11. WILLS, 3.

ESTATES OF DECEDENTS. See EXECUTORS. WILLS.

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ESTOPPEL.

See DRAINS, 5. HIGHWAYS, 2. INSURANCE, 5. MORTGAGES, 2, 3. SALES, 6.

1. The doctrine of *estoppel in pais*, where it is applicable, is not subordinate but supreme, staying the operation of other rules. *Marling v. FitzGerald*, 93

2. Evidence, introduced as supporting a defense of estoppel, as to a statement made by plaintiff, but which was not shown to have been known to or acted upon by the defendant or to have influenced him in any way, was immaterial and it was not error to strike it out. *Chase v. Woodruff*, 641

EVIDENCE.

Competency, examination, and credibility of witnesses. See WITNESSES.

Vested rights as to rules of evidence, etc. See CONSTITUTIONAL LAW, 3, 4.

Evidence in criminal actions. See CRIMINAL LAW, 2–6.

Examination of parties before trial. See DISCOVERY.

Judicial notice.

1. Courts do not take judicial notice of municipal ordinances not pleaded. *State ex rel. Leiser v. Koch*, 27

Presumptions. See CORPORATIONS, 12, 14, 15. CRIMINAL LAW, 16, 17. HIGHWAYS, 9. MINES, 5. SALES, 1. STREET RAILWAYS, 3.

2. "When the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." *Ellis v. State*, 513

3. No presumption is raised in the manner aforesaid which is materially retroactive. *Ibid.*

4. Proof of insolvency at a particular time does not create a presumption that the same condition existed at any considerable time anterior thereto, nor is it evidentiary of such condition at a time very remote from that to which the evidence is directed. *Ibid.*

5. Proof that a person was insolvent at a particular time by means of judgments against him shown at such time to be uncollectible, as circumstantial evidence that he was insolvent six months or more prior thereto, especially in case of his having shortly after the earlier date transferred his property for the purpose of securing payment of his obligations, is not relevant. *Ibid.*

6. Within reasonable limits under reasonable circumstances proof of insolvency of a person at a particular date as circumstantially bearing on like insolvency at an earlier date, is relevant. *Ibid.*

7. In the situation suggested in the last foregoing, if the prior date under all the circumstances is too remote to permit of the circumstance of insolvency at the later date having reasonably any evidentiary significance, it is irrelevant. *Ibid.*

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8. In the absence of evidence to the contrary it will be presumed that the same statutes exist in another state as in this state. *Moehlenpah v. Mayhew*, 561

9. Same point. *Elmergreen v. Weimer*, 112

Relevancy, materiality, and competency. See APPEAL, 4, 8. DEATH, 3, 4. EMBEZZLEMENT, 3. ESTOPPEL, 2. EVIDENCE, 4–7. FRAUD, 5. RAILROADS, 13, 14. WITNESSES, 6, 7.

10. Evidence of the reputation of a person as regards financial standing is relevant. *Ellis v. State*, 513

11. Evidence of the value of commercial paper based wholly on ignorance of the witness as to whether the maker possesses any property liable to execution, is not relevant, on the subject of the solvency of the maker. *Ibid.*

Same: Res gestæ. See RAPE, 10.

Admissions. See TRIAL, 4.

Parol evidence affecting writings

12. Generally, verbal negotiations between parties who finally reduce their contract to writing are incompetent, except so far as they are declaratory or evidentiary of facts and circumstances in the light of which the contract is made and in the light of which thereafter it may be construed. *Western L. & C. Co. v. Copper River L. Co.* 404

Opinion evidence.

13. A witness shown to have had considerable experience as assistant coroner might testify as to how long a person had been dead when he saw him, the objection that he was not a physician or qualified as an expert going rather to the weight of his testimony than to his competency as a witness. *Palmer v. Schultz.* 455

Weight and sufficiency. See HIGHWAYS, 8. JUDGMENT, 11–13. MINES, 5. NEGLIGENCE, 3, 4. PROCESS. RAILROADS, 21, 23. STREET RAILWAYS, 3.

EXAMINATION.
Of party before trial. See DISCOVERY.
Of witnesses. See WITNESSES, 3–5.

EXCESSIVE DAMAGES. See DAMAGES. DEATH, 2. NEW TRIAL.

EXECUTED CONTRACTS: Validity. See CONTRACTS, 2, 3.

EXECUTION.

1. Under secs. 2969, 2971, Stats. (1898), where a judgment of the circuit court for one county is docketed in another county an execution to the sheriff of the latter county should be issued from the circuit court for the former county. *Kissinger v. Zieger*, 368

2. Although the purchaser at an execution sale of land pays the amount of his bid on the day of sale, yet the sale is not consummated until the certificate thereof is executed and delivered to the purchaser; and issuance of the sheriff's deed to the purchaser within fifteen months after the delivery of the certificate of sale is an irregularity. *Ibid.*

3. Gross inadequacy of price and lack of actual notice or knowledge of the sale, together with some irregularity in the proceedings, are sufficient to warrant the court in setting aside a sale of land on execution. *Ibid.*

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EXECUTORS AND ADMINISTRATORS.

Settlement of estates: Infant parties: Guardians ad litem: Allowances for expenses. See GUARDIANS AD LITEM. TRUSTS AND TRUSTEES.

1. In judicial proceedings to settle an estate, infant parties must be represented by guardians *ad litem*, regardless of any statute; moreover, the court rules require it. *Will of McNaughton*, 179
2. A proceeding to settle the estate of a deceased person is in the nature of an action *in rem*, and all parties interested in order to be bound are required to be made parties. *Ibid.*
3. In such proceedings adult persons are interested in having infant parties properly represented, as without that such adults could not safely possess themselves of the fund whether it belonged to them or not, hence the basis for depleting the fund to pay the expenses of such representatives regardless of whether the wards have any interest in the fund. *Ibid.*

Claims: Time limited for presentation.

4. A judgment for deficiency on foreclosure of a mortgage, entered in the circuit court against an executor as such and ordering payment out of the estate in his hands, may properly be allowed by the county court as a claim against the estate, although not filed as such until after the expiration of the time limited for the filing of claims. *Pereles v. Leiser*, 401

Abatement and revival of actions. See ABATEMENT AND REVIVAL. JUDGMENT, 6.

EXPERT TESTIMONY. See EVIDENCE, 13.

FALSE REPRESENTATIONS. See FRAUD.

FARM CROSSINGS. See RAILROADS, 11, 12.

FELLOW-SERVANTS. See MASTER AND SERVANT, 8–10. RAILROADS, 1–9, 24.

FINDINGS OF FACT. See APPEAL, 8. CERTIORARI. JUDGMENT, 7–9. MOTIONS. TRIAL, 10.

FIRES negligently started. See NEGLIGENCE, 4, 5.

FORECLOSURE of mortgages: Judgment for deficiency: Allowance as claim against estate. See EXECUTORS, 4.

FOREIGN CORPORATIONS: Contracts: Validity, etc. See CORPORATIONS, 19–21.

FORFEITURES. See CONTRACTS, 6, 8. INSURANCE, 5. VENDOR AND PURCHASER, 4–6.

FORNICATION. See INDICTMENT, 3.

FRAUD.

See ABATEMENT AND REVIVAL, 1, 3. CONTRACTS, 11–14. DISCOVERY, 6–8. EMBEZZLEMENT, 5. INSURANCE, 4. JUDGMENT, 10–13. JURY, 3. SALES, 3–7.

1. An action for deceit cannot be maintained by one who acted blindly upon statements whose falsity he knew or by the exercise of ordinary observation would have known; but it is not essential that the person claiming to have been misled should have met every positive statement with incredulity and have made search to ascertain whether it was false. *Jacobsen v. Whitely* 434

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2. In determining whether the falsity of statements was obvious the intelligence or acuteness of the plaintiff and the extent to which he relied upon defendant by reason of acquaintance or confidence are matters to be considered. *Ibid.*

3. In an action for deceit in the sale of shares of stock in a dry goods company doing a retail business, the evidence—showing, among other things, that defendants were long-time acquaintances of plaintiff, that he had no adequate opportunity for the examination necessary to an understanding of the books of the company, and that the action of defendants was such as to divert him from such examination—is *held* not to justify a nonsuit on the ground that, by the exercise of ordinary care and observation, plaintiff should have known the falsity of defendants' statements as to the assets, debts, business, and earnings of the company. *Ibid.*

4. One who has been induced by fraud to purchase property may elect not to rescind the contract but to retain what he has received and recover damages for the deceit; and such right of recovery is defeated by no lapse of time less than that prescribed by the statute of limitations. *Ibid.*

5. In an action for deceit in the sale of stock in a corporation, a financial statement with which defendants were not shown to have been connected was not admissible to corroborate the charge of specific fraud. *Ibid.*

6. One who has been induced by the fraud of several persons acting in concert to purchase and pay for property, to his injury and their benefit, need not pursue his remedy against them separately or against those only into whose hands he can trace the money. The benefit secured by any one of such wrongdoers is deemed a benefit to all, and each is individually liable for the whole injury. *Heckendorn v. Romadka,* 416

7. In an action to recover damages for fraudulent representations whereby plaintiff was induced to purchase mining stock, a special verdict finding that defendant knowingly made the false representations for the purpose of inducing plaintiff to buy the stock, that the plaintiff relied thereon and was induced thereby to buy and pay for the stock, and that he is entitled to recover a certain sum, is *held* to cover the issuable facts and to be sufficient in form. *Ford v. Freeman,* 503

8. A complaint stating all the other facts essential to a cause of action for fraud and then alleging that plaintiff has been damaged by defendant and deceived by him by reason of the fraudulent statements in a certain sum, and that defendant became indebted to plaintiff in that sum and that said sum is due and owing, and that judgment therefor is demanded, sufficiently alleges damage. *Ibid.*

FUTURE ESTATES in land. See WILLS, 3.

GUARDIANS AD LITEM.

See EXECUTORS. TRUSTS, 4, 5.

1. Certain rules as to compensating, out of trust funds, judicial assistants such as guardians *ad litem* having been well established prior to the enactment of ch. 267, Laws of 1907, it is presumed the legislature intended the measure of compensation to be the one established by judicial policy. *Will of McNaughton,* 179

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2. The law referred to leaves the court broad discretion as to whether to allow compensation or not and the amount gauged by the judicial rule. *Ibid.*

3. The provision to the effect that the allowance must be fixed by the court in which the litigation is had is a limitation of authority. *Ibid.*

4. A judgment against the ward for costs is not a liability of the guardian *ad litem*. Payment thereof by him is not, under ordinary circumstances, to be recognized as a necessary expenditure of his. *Ibid.*

5. The words "payment can be directed by the court" limit the right of direction to property *in custodia legis*, leaving the balance, if any, allowed, collectible out of the property of the ward as his debt. *Ibid.*

6. The allowance is not required to be taxed after the manner of taxing costs. It may be fixed in any way within judicial discretion. *Ibid.*

7. In a proceeding to fix the allowance of a guardian *ad litem* he does not represent the ward. Whether in such cases the ward should be represented or left wholly to be protected by the court without assistance not decided. *Ibid.*

HEALTH: Sale of cigarette paper. See CIGARETTES.

HIGHWAYS.

Establishment, etc.: When bridge constitutes part of highway: Estoppel.

1. A bridge built and maintained by private individuals, though connected with a highway, is *held* not to be a part thereof so as to render the town liable for injuries caused by defects in the bridge. *Curtiss v. Bovina*, 660

2. To estop a town, in such a case, from denying that the bridge was a part of its highway, there must be evidence clearly tending to show an adoption of it as such by the town. *Ibid.*

Obstructions and encroachments: Evidence: Highway by user.

3. Where witnesses on one side testified from actual measurement that a post was three feet distant from the traveled track of a highway, while witnesses on the other side testified somewhat indefinitely and from mere recollection that it was nearer, the testimony of the former should be accepted as true. *Neale v. State*, 484

4. Where a highway by user is established, the wheel tracks and the land included between them do not necessarily designate the limits thereof, since at times, as when teams pass each other or the track is muddy, necessity or convenience may require departure from the main traveled track. *Ibid.*

5. A post set three feet from the traveled track of a highway may constitute an obstruction within the meaning of sec. 1326, Stats. (1898), rather than a mere encroachment within the meaning of sec. 1330. *Ibid.*

6. Such a post may constitute an obstruction though set between two large stones already in the highway. *Ibid.*

7. In an action to recover a penalty for obstructing by posts a highway claimed to have been established by user, a requested in-

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struction to the effect that, if defendant had occupied up to the line of said posts adversely and continuously for a period of twenty years immediately preceding the action, then he had a right to place the posts there, is *held* inapplicable, in the absence of any evidence that after the public had acquired an easement by prescription or otherwise the land had been adversely occupied by defendant for twenty years. *Ibid.*

8. An instruction that plaintiff claimed that defendant "obstructed a certain highway" at a point specified, "by setting some posts within said highway," and that "defendant admits the setting of some posts at the place mentioned," could not have been understood by the jury as stating that defendant admitted that the posts were set in the highway, especially in view of further instruction that the jury should find for defendant unless satisfied that the posts were within the limits of the highway as it existed at the time, etc. *Ibid.*

9. The presumption of a dedication is not necessary to support an easement acquired by the public by user; but it was a harmless error to charge that a highway by user is founded upon a dedication, which is evidenced by twenty years of adverse use by the public, where the jury found the existence of a highway by user at the place in question. *Ibid.*

10. Where the distance between the fences on the sides of a highway established by user only, not by dedication, was in places more than four rods, and the public did not in fact use the entire strip between the fences, it was prejudicial error to charge the jury that the maintenance of such fences for twenty years was conclusive proof of dedication of all land between them. *Ibid.*

Injuries from defects: Amendment of pleading: Special verdict: Instructions to jury: Negligence.

11. In an action against two towns for injuries alleged to have been caused by a defect in an *east and west highway*, the stone constituting the defect was alleged to have been on the north and south town line between the towns. On the trial it appeared that such stone was about eighteen inches west of the town line, wholly within one town, and a nonsuit was granted as to the eastern town. It appeared also that the stone was within the limits of a north and south highway, wholly within the western town, at the point where it was intersected by the east and west road. *Held*, that it was not error to permit the complaint to be amended, after plaintiff had rested, so as to describe the defect as being in the *north and south highway* at the intersection of the east and west road, and to admit further evidence as to the location and condition of such north and south highway. *Maxwell v. Wellington*, 607

12. It was immaterial in such case whether plaintiff was traveling along or across the defective highway. *Ibid.*

13. A question in the special verdict, "Was the highway at the place where and time when plaintiff was injured insufficient for public use?" is *held* to have fairly submitted the issues, so that it was not error to refuse to submit the question, "Was the road running north and south, where the same intersects the east and west road, insufficient for public travel?" although it was claimed that the defect was at a considerable distance from the north and south traveled track. *Ibid.*

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14. There being evidence that the stone constituting the alleged defect was near the east line of the north and south road, but in such close proximity to the traveled track at the point of intersection with the east and west road as to constitute a defect in the highway at such intersection, an instruction stating that "notwithstanding a road may contain a smooth traveled track of sufficient width, still, if there is an obstruction or declivity so close to the traveled track as to render the road or highway unsafe for those traveling thereon in the exercise of ordinary care, the highway may be insufficient," is *held*, though not entirely clear, not to have been harmful. *Ibid.*

15. An instruction that the action is based upon negligence of the town authorities in failing to lay out, open, and keep in repair the highway so as to render it reasonably safe for travel, and that the jury were to determine under all the evidence whether such insufficient condition was not only negligence on the part of the defendant town, but also whether such condition was the proximate cause of plaintiff's injury, is *held* not to have been prejudicial to the defendant, although not strictly a correct statement of the law, in that the liability of the town does not rest upon its negligence but upon the statute declaring it liable if the damage happens by reason of insufficiency of the highway. MARSHALL, J., is of the opinion that, inasmuch as the action is not founded upon insufficiency of the highway as originally constructed but upon failure to keep it in repair, it was strictly correct, under the decisions of this court, to say that the action was based on negligence. *Ibid.*

Same: Notice of injury. See LIMITATION OF ACTIONS.

HOMESTEAD. See EJECTMENT, 2.

HOMICIDE: Degrees. See CRIMINAL LAW, 11–14.

HUSBAND AND WIFE. See DEATH. EJECTMENT, 2. INSURANCE, 6–8.

IMPEACHMENT of witnesses. See WITNESSES, 6, 7.

INADVERTENCE of counsel. See PLEADING, 3, 4.

INDEPENDENT CONTRACTORS. See MASTER AND SERVANT, 1.

INDICTMENT AND INFORMATION.

See BANKS AND BANKING, 2.

1. Under an information charging a party as principal he may be convicted on evidence showing that he was present and aided and abetted the principal felon in the commission of the crime, where the punishment for the actual commission of the offense and that for aiding and abetting in its commission are the same. *Vogel v. State*, 315

2. Thus, several persons may be convicted under an information charging them jointly with having committed rape, and it is not necessary that one of them should have been specifically charged with the crime and the others charged as aiders and abettors. *Ibid.*

3. A person cannot be convicted of fornication under an information charging rape. *Ibid.*

INFANTS: Guardians *ad litem*. See EXECUTORS, 1–3. GUARDIANS AD LITEM. TRUSTS, 4, 5.

INFORMATION. See INDICTMENT AND INFORMATION.

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INJUNCTION. See CORPORATIONS, 8. COURTS. DRAINS, 5. JUDGMENT, 10–13.

IN REM. See EXECUTORS, 2.

INSOLVENCY. See APPEAL, 4. BANKS AND BANKING. EMBEZZLEMENT, 1, 3, 6. EVIDENCE, 4–7, 10, 11.

INSTRUCTIONS TO JURY.

1. Although a requested instruction was not technically correct, yet it called the court's attention to the subject, and omission of all instruction thereon was error. *Jeffery v. C. & M. E. R. Co.* 1

2. Where offense charged includes lesser ones, court should instruct as to every such offense established in any reasonable view by the evidence, but not as to others. *Weisenbach v. State,* 152

3. In absence of request, failure to charge as to any particular grade of offense included in the alleged crime is not harmful error. *Ibid.*

4. Failure to give fully the law on a subject is not necessarily error. If more specific instructions are desired they should be requested. *Maxwell v. Wellington,* 607

5. It is not error to refuse requested instructions adequately and fairly covered in the general charge or which relate to mere evidentiary matters. *Vogel v. State,* 315; *Milbrath v. State,* 354; and *Ryan v. Oshkosh G. L. Co.* 466

6. A requested instruction, though correct, may be refused if inapplicable to the facts. *Weisenbach v. State,* 152

7. A requested instruction as to twenty years' adverse occupancy up to a line of posts alleged to be an obstruction of a highway, *held* inapplicable. *Neale v. State,* 484

8. Language of the court, after giving requested instructions: "Now, I will come back to my own instructions," is disapproved but *held* not prejudicial error. *Maxwell v. Wellington,* 607

9. Instructions as to the proof necessary to convict defendants of aiding and abetting in a rape with which they were jointly charged are *held* not misleading or prejudicially erroneous. *Vogel v. State,* 315

10. On a trial for embezzlement by an officer of a corporation it was not error to charge that certain payments of interest were made by defendant, and that he held in trust for the owner certain moneys paid in to the corporation. *Milbrath v. State,* 354

11. In such case it was not error, in view of the evidence, to charge that the owner of the money lost it by fraud; but this part of the charge is not approved. *Ibid.*

12. An instruction that a man is presumed to intend the natural, probable, and usual consequences of his act, being given so as to indicate that such presumption is not conclusive, was proper, even though in the given case such consequences did not result. *Weisenbach v. State,* 152

13. Where offense charged includes lesser ones, an instruction requiring conviction of the greater one or acquittal, is favorable to accused. *Ibid.*

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14. So *held* as to refusal of instruction permitting conviction of assault and battery under information charging rape. *Vogel v. State*, 315

15. Omission of the word "ordinarily" in defining ordinary care is *held* in this case not to have been misleading, though in some cases it may be so. *Palmer v. Schultz*, 455

16. Error in a charge as to adverse possession was not harmful to defendant in ejectment where the evidence would not support a verdict for him on that defense. *Chase v. Woodruff*, 641

17. An error in charging that dedication was basis of highway by user was harmless where jury found that highway by user existed. *Neale v. State*, 484

18. An instruction that defendant admitted setting posts at the place mentioned, is *held*, in view of other instructions, not capable of being understood as stating that he admitted they were in the highway. *Ibid.*

19. An instruction as to obstructions or declivities near traveled track rendering highway unsafe is *held*, though not entirely clear, not to have been harmful. *Maxwell v. Wellington*, 607

20. An instruction that an action for injuries from a defective highway is based on negligence of the town is *held*, though incorrect, not to have been harmful error. *Ibid.*

INSURANCE.

LIFE.

Assignment of policy.

1. A person who obtains insurance on his life and pays the premiums for the benefit of another may assign or dispose of the policy in any manner not inconsistent with its terms, to the exclusion of the beneficiary named therein. *Meggett v. N. W. Mut. L. Ins. Co.* 636

2. A daughter applied for insurance on the life of her father, and was named as beneficiary in the policy, which further provided that in case of her death before the death of her father the insurance should be payable to his heirs at law. Either she or her father paid the premiums. *Held* that, as owners and in control of the policy, the daughter and her father had full power to assign it. *Ibid.*

3. The daughter, with the assent of the father, assigned the policy "and all . . . sums of money . . . now due or hereafter to arise or to be had or made by virtue thereof, and subject to all the terms, conditions, and provisions of said policy." *Held*, that such assignment was not restricted to any interest less than all the rights and interest inhering in the contract, and that thereunder the right of the assignee to the policy and its proceeds became absolute and the interest of all persons named therein as beneficiaries ceased. *Ibid.*

Change of beneficiary. See INSURANCE, 6. JURY, 3.

Findings that at the time of making a change in the beneficiary of his life insurance the insured was mentally competent, and that the change was not induced by fraud, coercion, or undue influence, are *held* not to be contrary to a clear preponderance of the evidence. *Hintz v. Wald*, 41

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Default in payments: Forfeiture: Waiver of strict performance.

5. Although by its terms a life insurance contract lapsed upon default in payment of any quarterly premium or instalment, yet the conduct of the insurance company during a period of more than two years prior to the death of the insured, in collecting and receiving after they were due all of such instalments except one (which was paid on the last day of grace) without anything in the course of dealing to suggest that the contract had been terminated and that there had been a reinstatement after a lapse in the manner specified in the contract, is *held* to have constituted a waiver of strict performance, notwithstanding the company in its correspondence and written notices insisted that no stipulation had been waived or modified; and the company is estopped from insisting on a forfeiture and is liable on the contract, although an instalment due three days before the death of the insured was not tendered until after and on the day of such death and was then refused. *Seidel v. Equitable L. A. Soc.* 66

Apportionment of surplus to tontine policy. See DISCOVERY, 3, 4.

Mutual benefit societies: Change of beneficiary.

6. Where one to whom a benefit certificate had been issued, in which his wife was named as beneficiary, substantially complied with all the requirements of the by-laws and rules of the association for proving loss of the certificate and for changing the beneficiary, and a new certificate was duly issued to him accordingly, the fact that the original certificate had not been lost but had been secreted by the wife did not affect the rights of the beneficiaries named in the new certificate, there being no question that the change of beneficiary was desired by the insured. *Raschke v. Haderer,* 129

Same: Who may be beneficiary: Marriage and divorce.

7. Within a year after his divorce a resident of this state was married in Illinois to another resident of Wisconsin. The laws of Illinois, like those of Wisconsin, prohibited such marriage. The woman knew the man had been divorced but did not know that their marriage was prohibited. She continued to cohabit with him as his wife in Wisconsin until his death more than a year after his divorce. *Held,* that there was no common-law marriage, and that the woman could not share as beneficiary in the proceeds of a mutual benefit certificate issued by a society whose by-laws did not authorize her, if not his wife, to be named as such beneficiary. *Severa v. Beranak,* 144

8. The fact that the insured was sick for several months prior to his death and was being attended to and cared for by his supposed wife during such illness did not bring her within a by-law of the society under which the insured might designate, as beneficiaries, "persons who are not related to him by blood, but who are dependent on him, or he on them, for their maintenance." *Ibid.*

INTENT. See CRIMINAL LAW, 2, 6, 16, 17. STATUTES, 1, 2.

INTEREST. See ACCOUNT STATED.

INTERSTATE COMITY. See CONTRACTS, 1. TELEGRAPHS.

INTERSTATE COMMERCE. See CIGARETTES, 3. CORPORATIONS, 21. RAILROADS, 9.

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INTOXICATION. See JUDGMENT, 2. TRIAL, 9.

INVESTIGATIONS: Power of legislature: Incurring expenses. See STATES.

JOINT and several liability. See FRAUD, 6.

JUDGES.

Term of office: Change in salary during term. See OFFICERS.

1. Art. VII of the constitution creates the office of justice of the supreme court, fixes the term of office, and provides for filling the same, and such term is a unit, including, so far as such article is concerned, periods within the full term of incumbency by appointment or election to fill a vacancy. *State ex rel. Bashford v. Frear,* 536
2. Whether "his term of office" in sec. 26, art. IV, of the constitution of the state of Wisconsin is synonymous with his incumbency of the office under a particular election or appointment, or is synonymous with the full term of the office created by art. VII, is not so free from doubt as not to be open to solution by judicial construction. *Ibid.*
3. The language may, as an original proposition, be regarded as treating with the term of office created by art. VII or any particular incumbency, whether of a full term or part of a term. *Ibid.*

JUDGMENT.

Void or voidable? Against deceased defendant.

1. Whether a judgment rendered in form against a defendant who died after service upon him, or appearance, and before the trial, is void or merely voidable, not determined. *Mochlenpah v. Mayhew,* 561

Not a liability of guardian ad litem. See GUARDIANS AD LITEM, 3.

For deficiency on foreclosure of mortgage: Allowance as claim against estate. See EXECUTORS, 4.

Determining and protecting rights of all parties. See CORPORATIONS, 8.

Vacating judgments entered on warrant of attorney: Equity.

2. Where a note was merely given in renewal of a prior note which was unimpeached and founded upon a valuable consideration, the fact that the maker's signature to the renewal was procured while he was in a state of intoxication brought on by the payee's agent for that purpose is not a defense available upon a motion to set aside a judgment on the note entered upon warrant of attorney. *Kissinger v. Zieger,* 368
3. Courts exercise an equitable supervision over judgments entered upon warrants of attorney, and the party moving to set aside such judgment must show that he has been subjected to some injustice, it not being sufficient for him to aver mere technical errors or irregularities. *Ibid.*

Conclusiveness of adjudication: Persons concluded.

4. Parties who were codefendants in a former action are not concluded, as between themselves, by the judgment therein unless there was an issue framed between them covering the point in question in subsequent litigation, or unless the plaintiff in the former action made a claim against each defendant which nega-

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tived the right claimed in the subsequent litigation by one of them against the other. *Moehlenpah v. Mayhew*, 561

5. Where no issue was made by the pleadings between two defendants, it may be shown in a subsequent litigation between them upon a different cause of action that the issue in question was not in fact adjudicated in the former action; and proof of the death of one defendant before trial or verdict might show that as to him and his representatives there was no issue tried on notice and hearing, and hence no decision binding his representatives and his codefendant mutually as between themselves. *Ibid.*

6. Where one of several defendants died and such part of the cause of action as was averred against the other defendants survived against them, and the cause thereafter proceeded to trial and judgment against such other defendants without bringing in the successor to the rights and liabilities of the deceased party, such judgment, under secs. 2804, 2805, Stats. (1898), did not affect the deceased or his interest in the subject of the action and has no binding force upon his personal representative and heirs in subsequent litigation between them and one of the surviving defendants in the former action. *Ibid.*

Same: Matters concluded. See CONTRACTS, 13.

7. Findings of fact not material to the issues in an action are not binding upon the parties in subsequent litigation. *Ibid.*

8. In an action to rescind, on the ground of mental incompetency, fraud, and undue influence, a sale of a remainder subject to a life estate, a finding that at the time of the sale neither party thereto knew of the prior death of the life tenant is material and relevant to the issues. *Ibid.*

9. It is not the findings of the court which conclude the parties in subsequent litigation, but the judgment entered thereon. *Ibid.*

Same: Law of the case. See APPEAL, 8, 9.

Restraining enforcement: Fraud: Perjury.

10. Equity will restrain the enforcement of a judgment obtained solely by fraud and perjury of the successful party if the defeated party was not guilty of any negligence or laches. *Boring v. Ott*, 260

11. The enforcement of a judgment regularly entered after a trial in a court of law should not be restrained in equity unless the ground for interference is established beyond all reasonable controversy by evidence clear, convincing, and satisfactory. *Ibid.*

12. The evidence in this case is *held* insufficient, under the rule above stated, to establish the fraud and perjury alleged. *Ibid.*

13. MARSHALL, J., concurring in the result, is of the opinion that in such a case the facts should not be required to be shown by any higher degree of proof than, as in ordinary cases of fraud, by clear and satisfactory evidence; that the proof was sufficient in this case; but that, in order to be ground for relief, the fraud must have been extrinsic and have directly induced the judgment, and that the mere fact that the judgment was obtained by perjured testimony does not warrant equitable interference. *Ibid.*

Reversal on appeal. See APPEAL, 5–7.

JUDICIAL POWER. See RAILROADS, 5. STATES, 7.

JURISDICTION. See COURTS.

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JURY.

Special venire, when to be issued: Absence of defendant.

1. Sec. 2533*d*, Stats. (1898), does not contemplate that a special venire shall be issued until the regular panel of jurors is actually exhausted; but the issuance of such a venire in this case two days before the trial began, in anticipation of the fact that a sufficient number of qualified jurors could not be obtained from the regular panel, is *held* not to have been prejudicial to the defendants, and the error or irregularity should be disregarded under secs. 2829, 4659. *Vogel v. State*, 315

2. The absence of the defendant when a special venire is ordered does not invalidate his conviction. *Ibid.*

Trial by court or jury.

3. Where the relief asked was the cancellation, on the ground of fraud, of an instrument changing the beneficiary of life insurance, the issue was properly triable by the court. *Hintz v. Wald*, 41

Questions for jury: Judicial power. See RAILROADS, 5, 6.

LACHES. See ABATEMENT AND REVIVAL, 2, 3. ACCOUNT STATED. DRAINS, 5.

LAND CONTRACTS. See EJECTMENT, 2. VENDOR AND PURCHASER.

LANDLORD AND TENANT. See MINES AND MINING.

LAW OF THE CASE. See APPEAL, 8, 9.

LEASE of mining lands: Revocation, etc. See MINES AND MINING.

LEGISLATURE: Powers: Investigations: Incurring expenses. See STATES.

LEX LOCI. See CONTRACTS, 1. TELEGRAPHS.

LICENSES: Revocation. See MINES AND MINING.

LIFE INSURANCE. See INSURANCE.

LIMITATION OF ACTIONS.

See ABATEMENT AND REVIVAL, 2, 3. EXECUTORS, 4.

1. Notice of a personal injury resulting from defects in a street, served upon the city, reciting that the damage was caused by the city and that satisfaction was claimed from it, was not sufficient, under subd. 5, sec. 4222, Stats. (1898), to fix liability upon a gas company which was primarily liable and to which the city tendered the defense of the action. *Uhlenberg v. Milwaukee G. L. Co.* 148

2 For the same reason, the complaint in the action against the city could not serve as a notice to the gas company; and the tender of defense, besides not containing the essential recitals, did not meet the requirement of the statute that the notice should be "signed by the party damaged, his agent or attorney." *Ibid.*

3. The fact that a statute provides that a notice shall not be insufficient or invalid solely because of inaccuracy or failure in stating certain things if there was no intention to mislead and no one is in fact misled thereby, indicates that in other respects the notice must substantially comply with the requirements of the statute. *Ibid.*

LOGS AND TIMBER. See VENDOR AND PURCHASER.

LOST INSTRUMENTS: Benefit certificate. See INSURANCE, 6.

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MANDAMUS.

1. The petition for a writ of *mandamus* to compel a building inspector to issue a permit pursuant to city ordinances should show the existence of an ordinance imposing such duty and that the duty is absolute or the action under the ordinance merely ministerial. *State ex rel. Leiser v. Koch,* 27

2. An allegation in such petition that it is the duty of said inspector, under the ordinances of the city, to issue such permit, does not sufficiently plead the ordinances. It is not an averment of fact, but a mere conclusion of law not admitted by demurrer. *Ibid.*

3. A demurrer to the return to an alternative writ of *mandamus* relates back to the petition and raises the question of its sufficiency. *Ibid.*

4. The return of a building inspector to an alternative writ of *mandamus* commanding him to issue a permit for certain repairs or alterations in the basement of a building, that "the superstructure is so dilapidated, rotten, and in bad condition that it will be unwise and unsafe to permit the repair of said building in such manner," is a good return if the ordinances governing his action permit of any discretion on the part of the inspector in refusing permits. *Ibid.*

MARRIAGE AND DIVORCE. See INSURANCE, 7.

MASTER AND SERVANT.

Who is the employer: Independent contractors.

1. One H. was employed by defendant at a certain compensation per day to procure the necessary workmen and attend to the construction of a mill, defendant to furnish all materials and to pay, through H., the men hired by the latter. Defendant exercised a control over the undertaking to the extent of directing its progress, course of procedure, and general management. *Held,* that H. was not an independent contractor, and that the workmen were employees of defendant. *Rankel v. Buckstaff-Edwards Co.* 442

Liability for injuries to servants: Unsafe appliances or places for work.

2. A platform four feet square with a rope at each corner by which it was to be tied at the proper height to projections on telephone poles was furnished by a telephone company to its cable splicer and his assistant, to be kept in their custody and used in their work. After it had been in use by them for several months one of the ropes parted, precipitating them to the ground, and the assistant was injured. *Held,* that the platform being a mere appliance, sufficient when furnished, and the extent of the wear and weakening of its ropes being better known to the employees who used it than to any one else, the employer was not liable. *Isaacson v. Wis. Tel. Co.* 63

3. In an action for injuries to a helper in a brass foundry, alleged to have been caused by a defect in the platform on which he was working, the evidence is *held* to establish, contrary to the verdict of the jury, that the platform was reasonably safe when he went to work on the morning of the accident, and not to show any negligence or failure of duty on the part of the

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defendant in respect to keeping it safe. *Yezick v. Chicago Brass Co.* 342

4. If, after plaintiff began work on the platform on the morning in question, the boards thereof were burned or became displaced so as to render the place dangerous, the defect or danger being as readily discoverable by him as by any other person in defendant's employ, he must be held to have assumed the risk of injury. *Ibid.*

Same: Warning or instruction to servants: Assumption of risks.

5. In an action for injuries to an employee who, while operating a boring machine, was struck by a rapidly revolving hand crank which he had permitted to remain upon the crank shaft when he applied the power, direction of a verdict for the defendant is *held* to have been proper, it being established beyond dispute by the evidence that plaintiff had been properly instructed and knew that the shaft revolved when the power was applied and that the danger from the revolving crank was obvious. *Goetsch v. International H. Co.* 385

6. It is the duty of a master using hazardous agencies in the conduct of his business to warn his servants, not informed on the subject, of the extraordinary risks attending such use. *Rankel v. Buckstaff-Edwards Co.* 442

7. A workman who, after a blaster had pronounced the place safe for continuing the work of digging, was injured by striking with his pick an unexploded charge of dynamite, is *held* not to have been informed of or to have had reason to apprehend the particular danger, so as to be chargeable with assumption of the risk. *Ibid.*

Same: Negligence of fellow-servants. See RAILROADS, 1–9, 24.

8. A master is not liable for injuries to a servant caused by negligence of a fellow-servant, if he used reasonable care in selecting the fellow-servant for the work in question, acting upon such information as to his skill and competency as ordinarily prudent men act upon under the same or similar circumstances. *Rankel v. Buckstaff-Edwards Co.* 442

9. The evidence in this case is *held* to show that defendant was not negligent in the selection of a servant to break up with dynamite the frozen ground where a mill was to be built. *Ibid.*

10. One employed for the special work of breaking up with dynamite the frozen ground where a mill was to be erected was not a fellow-servant of a workman engaged in excavating the earth who, beyond assisting in driving the holes in which the charges of dynamite were placed, took no part in the separate and distinct operation of blasting; and the common master is liable to such workman for injuries resulting from negligence of the blaster. *Wiskie v. Montello G. Co.* 111 Wis. 443, distinguished. *Ibid.*

MAXIMS.

Expressio unius est exclusio alterius, 252.
Judicia sunt tanquam juris dicta, et pro veritate accipiuntur, 295.
Res ipsa loquitur, 353.
Res judicata pro veritate accipitur, 575.
Stare decisis, 245, 521.

MEDICAL EXAMINERS: State Board. See PHYSICIANS AND SURGEONS.

MENTAL COMPETENCY. See INSURANCE, 4. JUDGMENT, 8. PLEADING, 2.

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MINES AND MINING

1. The words "crevice or range" in sec. 1647, Stats. (1898), are equivalent to "lode or vein," the word "range" being limited by its associated word, "crevice;" which has been defined to mean a mineral-bearing vein. *St. Anthony M. & M. Co. v. Shaffra*, 507

2. Under sec. 1647, Stats. (1898), a miner entering upon land under a mere license or lease, revocable at the will of the lessor or licensor, has the right, if he strikes a prospect, to continue his exploration sufficiently to determine whether it will lead to a discovery or not; and if he discovers a crevice or vein he may follow that deposit of ore, within the lines of the land upon which he was licensed to work, lengthwise, sidewise, and downward until he has exhausted the crevice or vein; and the landowner cannot in the meantime revoke the license or lease unless the miner forfeits his right as provided in secs. 1647, 1649. *Ibid.*

3. The word "discovery" in such statute must have a reasonably strict construction. *Ibid.*

4. The evidence in this case is *held* not to show "the discovery of a crevice or range," within the meaning of sec. 1647, Stats. (1898), but merely the development and uncovering of a pocket or deposit of zinc ores near old workings and being part of the same mineralized band or zone running through a known mineral-bearing lot. *Ibid.*

5. If, from long-continued possession and working of land for mining purposes by licensees and those claiming under them, it could in any case be presumed that there had been a discovery of a crevice or range and that they were in possession pursuant hereto, the evidence in this case as to the known mineral-bearing character of the land, the old workings theretofore discontinued, and the miners' description of the land and of their operations thereon, negative such presumption. *Ibid.*

6. Where the answer in ejectment claimed that defendants had an irrevocable mining license and denied plaintiff's title to the ore and its right of possession, formal defects, if any, in a notice to quit given to the defendants, but not before the court on appeal, are not available to reverse a judgment for the plaintiff. *Ibid.*

MINORS: Guardians *ad litem*. See EXECUTORS, 1-3. GUARDIANS AD LITEM. TRUSTS, 4, 5.

MISTAKE. See CONTRACTS, 9-14. JUDGMENT, 8. PLEADING, 3, 4.

MITIGATION of damages for taking of land. See RAILROADS, 11-14.

MONEY HAD AND RECEIVED. See TOWNS, 2.

MORTGAGES.

Consideration. See BILLS AND NOTES, 5.

Assignment: Recording.

1. The indorsee of a negotiable note and mortgage may safely hold possession thereof without recording his assignment, and, nothing else appearing, he will be protected against payments by the debtor to the original mortgagee who has not possession of the note and mortgage. *Marling v. Jones*, 82

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2. But it is otherwise as against one who purchases the mortgaged land in good faith and for a valuable consideration without notice of the assignment, and who receives from or through the vendor, at the time of his purchase and as part of the same transaction, a conveyance of the land and a satisfaction of the mortgage by the apparent owner of record. Against such a purchaser who places his deed and satisfaction of mortgage on record before the assignment of the mortgage is recorded, the assignee is estopped to assert his mortgage lien. *Ibid.*

3. The mere fact that the deed delivered to such a purchaser simultaneously with the satisfaction of mortgage and as part of the transaction excepted the mortgage from the covenant against incumbrances, did not put him in the position of a debtor paying the mortgage debt. *Ibid.*

Foreclosure: Judgment for deficiency: Allowance as claim against estate. See EXECUTORS, 4.

MOTIONS.

See NEW TRIAL.

When a question of fact arises upon the hearing of a motion, if a party does not request a reference (under subd. 3, sec. 2864, Stats. 1898) in order that evidence may be taken and witnesses examined, he waives that right, and the court may decide the question upon affidavits. *Kissinger v. Zieger,* 368

MUNICIPAL CORPORATIONS.

Ordinances: Judicial notice: Pleading. See EVIDENCE, 1. MANDAMUS, 1, 2.

Building inspector: Permit for repairs. See MANDAMUS.

Streets: Injuries from defects: Notice. See LIMITATION OF ACTIONS.

Policemen's pension fund. See POLICEMEN'S PENSION FUND.

MUTUAL BENEFIT SOCIETIES.

See INSURANCE, 6–8.

MUTUALITY of contract.

See CONTRACTS, 2, 3.

NEGLIGENCE

See CONTRACTS, 10, 13, 14. ELECTRICITY. FRAUD, 1–3. HIGHWAYS, 15. MASTER AND SERVANT. RAILROADS, 1–9, 21–24. STREET RAILWAYS. TELEGRAPHS. TRIAL, 7–9.

Defining "ordinary care:" Instructions to jury.

1. A charge defining ordinary care to be "such care as a man of ordinary care and prudence would have used under circumstances like those disclosed in the testimony," is *held*, if inaccurate, not to have been misleading in this case merely because it did not say "such care as a man of ordinary care and prudence would *ordinarily* have used" and did not say "under the same or similar circumstances." But the omission of the word "ordinarily" from the definition may sometimes be misleading. *Palmer v. Schultz.* 455

Contributory negligence: Evidence: Nonsuit.

2. Unless there is enough in the testimony to enable a court to say, as a matter of law, that the plaintiff was guilty of contributory negligence, a nonsuit should not be granted on that ground. *Grimm v. Milwaukee E. R. & L. Co.* 44

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3. Contributory negligence is a defense that must ordinarily be shown by affirmative evidence or by logical inference from such evidence, and is not established by a mere absence of proof. *Ibid.*

Fires negligently set: Evidence: Special verdict.

4. In an action for damages on account of a fire alleged to have been negligently started by defendant on his own land and negligently allowed to escape onto plaintiff's adjoining land, the evidence is *held* to sustain a verdict finding that the fire was not caused by defendant's negligence. *Bratz v. Stark*, 599

5. A special verdict in such case finding that the fire which started on defendant's lands and burned over the lands of the plaintiff was not caused by negligence of the defendant, is *held* to have covered the question whether that fire started by reason of any negligence of defendant in starting or guarding certain brush pile fires from which it was claimed the fire in question originated; and, the evidence being undisputed and conclusive that after that fire was discovered no efforts would have availed to prevent its spread to plaintiff's land, it was not necessary to submit that question to the jury. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL.

See APPEAL, 1. CONTRACTS, 13, 14. CRIMINAL LAW, 20. SALES, 4.

A motion for a new trial, not specifying as a ground therefor that the damages are excessive, does not raise that question. *Duffy v. Radke*, 38

NONRESIDENTS. See SETOFF AND COUNTERCLAIM, 2–5

NONSUIT. See NEGLIGENCE, 2.

NOTICE.
Of want of consideration. See BILLS AND NOTES, 3, 4.
Of sale on execution. See EXECUTION, 3.
Of personal injury. See LIMITATION OF ACTIONS.
To quit. See MINES AND MINING, 6.
Of falsity of representations. See SALES, 5, 6.
Of election to rescind. See SALES, 6, 7.

OBLIGATION OF CONTRACT: Impairing. See CONSTITUTIONAL LAW, 2, 3.

OBSTRUCTIONS. See HIGHWAYS, 3–10.

OFFICERS.

Term of office: Change in salary during term: Persons filling vacancies.

1. Generally speaking, a constitutional prohibition as to increase or decrease of the salary incident of an office during a term thereof, whether in the form of a prohibition of such a change during the term for which an officer is elected or during an officer's term of office, refers to the full term, fixed by the fundamental or other law. *State ex rel. Bashford v. Frear*, 536

2. In the situation last mentioned, generally speaking, a person appointed to a vacancy or elected thereto, does not have a term of office, in the constitutional sense, but takes a part of the unit, to wit, of the full term. He merely steps into the place

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and term of his predecessor and becomes subject to the incident of that term, the salary. *Ibid.*

3. The language "his term of office" in the constitutional provision creating legislative disability to change the compensation of public officers under some circumstances, is ambiguous. *Ibid.*

4. TIMLIN, J., concurring, is of the opinion that sec. 26, art. IV, Const., relates to the *officer*, not to the *office*, and to *his* term, not to *the* term; and that the true interpretation of the section is that he who comes into an office lawfully by election or appointment to fill a vacancy caused by the death, disability, resignation, or removal of a different prior incumbent is not under the restrictions as to increase or diminution of salary which bound the prior incumbent, but takes under the law in force at the time of his appointment or election to fill the vacancy. *Ibid.*

Resignation: When vacates office. See CORPORATIONS, 16.

Liability for moneys had and received: Dereliction of duty. See TOWNS, 2.

Compelling performance of duty: Building inspectors. See MANDAMUS.

Secretary of state and state treasurer: Restraining payment of moneys. See COURTS.

Attorney general: Refusal to bring action. See COURTS.

District attorney. See CRIMINAL LAW, 3, 7–10.

Sheriffs, etc.: Return of service: Proof of falsity. See PROCESS.

Town officers: Authority to bring action. See TOWNS, 3.

Officers of corporations. See CORPORATIONS, 5–16. CRIMINAL LAW, 1. WITNESSES, 1.

OPINION EVIDENCE. See EVIDENCE, 13.

OPINIONS: Inaccuracy. See APPEAL, 10.

ORDINANCES: Judicial notice: Pleading. See EVIDENCE, 1. MANDAMUS, 1, 2.

PAROL EVIDENCE affecting writings. See EVIDENCE, 12.

PARTIES.
Who may bring action. See CORPORATIONS, 9–15. COURTS
Necessary defendants. See CORPORATIONS, 10.
Infant parties: Guardians *ad litem*. See EXECUTORS, 1–3. GUARDIANS AD LITEM.
Death of party. See ABATEMENT AND REVIVAL. JUDGMENT, 1, 5, 6.

PAYMENT. See MORTGAGES, 1, 3. PRINCIPAL AND SURETY.

PENSIONS. See POLICEMEN'S PENSION FUND.

PERFORMANCE of contract. See CONTRACTS, 8. INSURANCE, 5. VENDOR AND PURCHASER, 4–6.

PERJURY as ground for restraining enforcement of judgment. See JUDGMENT, 10–13.

PERPETUITIES

See WILLS, 3.

Even a trust is void as creating an unlawful perpetuity if the trust term exceeds the period permitted by statute, where there is no power of sale and the statute—like secs. 2089, 2091, Stats. (1898)—forbids alienation by the trustee and the beneficiary during the continuance of the trust. *Will of Adelman*, 120

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PHYSICIANS AND SURGEONS.

1. Ch. 422, Laws of 1905, giving to the circuit courts jurisdiction to annul any certificate of registration procured from the Wisconsin State Board of Medical Examiners by fraud or perjury or issued through error of the board, does not contemplate a trial *de novo* of the questions presented to the board. The term "error" is used therein in the sense in which it is ordinarily understood as applied to trials in courts before juries,—that is, aside from jurisdictional errors such as would render the decision void, it is confined to such absence of evidence in support of the board's decision that in no reasonable view thereof could its decision be justified, or prejudicial refusals to admit or exclude evidence, or other prejudicial misapprehensions of law. *State v. Schmidt*, 53
2. The term "physician," as used in ch. 87, Laws of 1899, providing for registration of reputable resident physicians who were on July 1, 1897, in the actual practice of medicine in this state, includes any person, of whatever school or of no known school, engaged in good faith in treating human ills by any remedy or remedies, however simple, so as to be known among the people as a physician,—especially in view of ch. 264, Laws of 1897 (referred to in the act of 1899), wherein the term is expressly defined as including every person "who shall, for a fee, prescribe drugs or other medical or surgical treatment for the cure or relief of any wound, fracture, bodily injury, infirmity or disease." *Ibid.*
3. The term "reputable," as used in said ch. 87, Laws of 1899, means reputable in the common lexical sense, and does not necessarily imply graduation from a reputable medical college or membership in an incorporated medical society. *Ibid.*
4. In this case a certificate of registration issued, under ch. 87, Laws of 1899, upon competent proof, to one who stated in his application that he belonged to the "physio-medical and hydropathic" school, is *held* not to have been issued through error of the Board of Medical Examiners. *Ibid.*

PLEADING.

Complaint, petition, etc.: Construction and sufficiency. See CONTRACTS, 11–13. CORPORATIONS, 11–15. DISCOVERY, 4, 7. EVIDENCE, 1. FRAUD, 8. MANDAMUS, 1–3. PLEADING, 2.

Same: Supplemental complaint. See CONTRACTS, 14.

1. Under some circumstances a court will, of its own motion, direct a supplemental complaint to be filed if the justice of the case requires it. *Moehlenpah v. Mayhew*, 561

Answer, return to writ, etc. See CORPORATIONS, 19, 20. MANDAMUS, 4. MINES, 6. PLEADING, 3, 4.

Counterclaim. See SETOFF AND COUNTERCLAIM.

Demurrer: Relation back to prior pleading. See DRAINS, 4. MANDAMUS, 3.

Pleading municipal ordinances. See EVIDENCE, 1. MANDAMUS, 1, 2.

Amendment of pleading.

2. In an action to set aside a trust deed on the ground of mental incompetency of the grantor, there was no error in allowing

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the complaint to be amended at the trial so as to allege that the deed was never delivered. *Dexter v. Witte*, 74

3. In the allowance of amendments to pleadings, especially to answers, a liberal policy should be pursued in furtherance of justice; and ordinarily, where material matter is omitted from an answer by mistake or inadvertence, an amendment should be allowed. *Palmer v. Schultz*, 455

4. In an action for death of one alleged to have been killed by falling, in the nighttime, into an opening where the sidewalk on a viaduct had been torn up by defendant, the allegations as to the time and manner in which decedent met his death were not denied in the answer. *Held*, not an abuse of discretion, at the trial more than three years later, to refuse leave to amend the answer so as to put those matters in issue, it appearing that by reason of the delay, for which plaintiff was not responsible, it had become impossible for her to procure any witness to prove the facts so alleged and admitted. *Ibid.*

Variance. See CONTRACTS, 11, 13.

Examination to enable party to plead. See DISCOVERY.

Pleading in criminal actions. See INDICTMENT AND INFORMATION.

PLEDGES. See BILLS AND NOTES, 5. CORPORATIONS, 3–8.

POLICE POWER. See DRAINS, 1. RAILROADS, 1–9.

POLICEMEN'S PENSION FUND.

See CERTIORARI, 1.

Within the meaning of sec. 8, ch. 397, Laws of 1903—providing for retirement of a policeman who should be *injured* while in active service and thereby disabled,—and of sec. 9—providing for a pension for the family of one who should "die as the result of an *injury* received while in the line of his duty, as described in the preceding section,"—the contracting of a disease (in this case, pneumonia) is being "injured" and is the receiving of an "injury." So *held*, notwithstanding the law of 1903 in effect amended, so that it should read as above, an earlier law (ch. 265, Laws of 1899) which provided in sec. 9 thereof for a pension when death resulted from "an injury received while in the line of his duty or any disease contracted by reason of his occupation." *State ex rel. McManus v. Trustees*, 133

POSSESSION.
Of land. See EJECTMENT.
Of note and mortgage. See MORTGAGES, 1, 2.

PRECATORY provisions. See WILLS, 4.

PRESCRIPTION. See HIGHWAYS, 7, 9, 10.

PRESUMPTIONS. See APPEAL, 4. CORPORATIONS, 12, 14, 15. EVIDENCE, 2–9. HIGHWAYS, 9. MINES, 5. SALES, 1. STREET RAILWAYS, 3. TRIAL, 10.

PRIMARY ELECTION LAW. See ELECTIONS.

PRINCIPAL AND AGENT. See BILLS AND NOTES, 4. CIGARETTES. CORPORATIONS, 19–21.

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PRINCIPAL AND SURETY.

See CORPORATIONS, 21.

1. Whenever a creditor has a right and opportunity to apply property of the principal debtor to the satisfaction or security of the debt, he owes to the surety a duty to do so, and release or waiver of that right to the prejudice of the surety and without his consent will discharge the latter, at least *pro tanto*. *Pauly Jail B. & M. Co. v. Collins*, 494

2. A contractor, having the right under his agreement with a subcontractor to discharge the debts of the latter for material or labor out of each instalment when it became due to the subcontractor, or to withhold payment until receipts were produced, released that security and paid the subcontractor without requiring payment for the materials or labor which had been furnished to him. *Held*, that a surety upon the subcontractor's bond was thereby discharged from liability to the principal contractor for sums thereafter paid by him in discharge of claims for such material and labor. *Ibid.*

PRINTED CASE on appeal. See COSTS, 3.

PROCESS.

There is no fixed rule as to the quantum of proof required to establish falsity of an officer's return. Evidence reasonably, clearly satisfying the trier or triers that the return is false is sufficient. *Raulf v. Chicago Fire Brick Co.* 126

PROMISSORY NOTES. See BILLS AND NOTES.

PUBLIC HEALTH. See CIGARETTES.

PUBLIC POLICY. See CONTRACTS, 1. RAILROADS, 4. TELEGRAPHS.

RAILROADS.

Regulation: Liability for injuries to employees: Validity and construction of statute.

1. The business of operating a railroad differs from others in its nature, in its relation to the public, and in its peculiar dangers to employees and to the public, so as to justify special regulation, and to that end the separation of railroad companies into a class for purposes of legislation having for its object the protection of their employees and the safety of the public. *Kiley v. C., M. & St. P. R. Co.* 215

2. Ch. 254, Laws of 1907,—amending sec. 1816, Stats. (1898), and imposing upon every railroad company liability for all injuries sustained by any employee thereof (except employees working in shops and offices) while engaged in the line of his duty as such, caused in whole or in greater part by negligence of any other employee of such company,—is designed to enforce greater care on the part of the companies in the selection of employees and thereby to secure not only protection for the employees but the safety of the public, and is not invalid under the constitutional guaranties as to due process of law and equal protection of the laws. *Ibid.*

3. It is not essential to the validity of such legislation that its operation should be confined to employees actually engaged in operating trains or incurring risks peculiar to the railroad busi-

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ness,—the special regulation having reference to railroad companies as a class, and not necessarily to any particular class of employees. *Ibid.*

4. Office and shop employees of railroad companies are sufficiently distinct in their employment and relation to the conduct of the business to justify the legislature, within the field of its discretion and with regard to public policy, in exempting them from the operation of the law. *Ibid.*

5. Subd. 5 of said sec. 1816, Stats., as amended by ch. 254, Laws of 1907 (providing that "in all cases under this act the question of negligence and contributory negligence shall be for the jury"), is merely declaratory of the law as it existed, namely, that when the court has found that there is legal evidence tending to show negligence or contributory negligence it is for the jury to determine from the evidence adduced whether negligence or contributory negligence in fact existed. It does not, therefore, deprive the courts of any judicial power vested in them by the constitution (art. VII, sec. 2). *Ibid.*

6. Even if said subd. 5 were construed as conferring judicial power upon juries its invalidity would not render the other portions of the act invalid, it being a separate and distinct provision, not the compensation for or inducement to the enactment of such other portions. *Ibid.*

7. Subd. 3, 4, of said sec. 1816 (providing, in effect, that contributory negligence of the injured employee shall be no bar to a recovery if the negligence of the company or other employee contributed in a greater degree to the injury) are within the legislative power of police regulation, and cannot be held so arbitrary and unreasonable as to be invalid under the constitutional guaranties of equal protection and due process of law. *Ibid.*

8. Subd. 6 of said sec. 1816 (providing that no contract, rule, or regulation shall exempt a railroad company from the full liability imposed by the act) is a proper provision, within the discretion of the legislature, to secure to employees the benefits of the rights created, and does not unduly infringe the company's right to liberty of contract. *Ibid.*

9. Subd. 8 of said sec. 1816 (which seeks to extend the rights and liabilities created by the act to cases where the injuries were received in another state if the contract of employment was made in this state) deals with a subject independent of and severable from the other parts of the act, and if invalid does not render the whole law invalid. [Whether said subd. 8 is invalid or not is not determined.] *Ibid.*

Condemnation of land.

10. Where land has been condemned for the use of a railroad and the right to the exclusive use thereof has vested in the railroad company under the award, it cannot be surrendered in whole or in part, upon an appeal from the award, without the consent of the landowner. *Jeffery v. C. & M. E. R. Co.* 1

11. Nor can the defendant railroad company, upon such appeal, elect to take a lesser estate or different interest than that condemned or, for the purpose of mitigating damages or in lieu of damages or value, tender back rights, easements, uses, or conveniences other than the "suitable and convenient farm crossings" provided for in sec. 1810, Stats. (1898). *Ibid.*

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12. Such crossings as the railroad company may so tender and be allowed to construct and maintain in mitigation of damages must be constructed and maintained upon the lands taken, or upon such lands and other lands of the company, without interference with other land or property of the plaintiff. *Ibid.*

13. The fact that other lands in the immediate vicinity could be purchased from a third person at a reasonable price, to which the plaintiff might shift his business, cannot be shown in such a case to reduce the damages to which plaintiff is entitled. *Ibid.*

14. An offer to show that the defendant company held an option for the purchase, at a certain price, of adjoining land upon which plaintiff might extend his business, and that defendant was ready to assign this option to plaintiff, could have no relevancy except as tending to prove the value of land in that vicinity; and without sworn testimony as to the truth of the statements in the option it was not competent evidence of such value. *Ibid.*

15. On appeal from the award in proceedings to condemn land for a railroad the questions submitted to the jury were: (1) What was the fair market value at the date of the award of the strip of land condemned, "considering said strip as a part of plaintiff's entire tract and premises as used in his business?" and (2) In what amount was the fair market value of the remainder of plaintiff's premises depreciated at said date by the taking of the strip condemned? *Held*, that in answering the first question the jury necessarily included some portion at least of the damage to the remainder of the premises, and thus there was inevitably a duplication of the damages in that respect. MARSHALL, J., is of the opinion that the questions submitted to the jury were strictly proper, especially in connection with the charge of the court, carefully warning the jury against duplication of damages; but is of the opinion, nevertheless, that the damages found are so excessive as to show that the jury did not heed such warning or disregard the evidence. *Ibid.*

16. The admission of evidence as to the value of the land taken "considered as an integral part of the entire plant and property," and "as a part of the entire plant and manufacturing site belonging to the plaintiff, including the machinery and fixtures, considering the plant as an entirety," was erroneous because, in connection with the questions so submitted to the jury, it necessarily led to duplication of damages. *Ibid.*

17. The finding of the jury as to the value of the strip taken, viewed in the light of the evidence, is *held* to show that they included therein a portion of the damage to the remainder of the premises and that there was thus a duplication of damages. *Ibid.*

18. The fact that a strip across plaintiff's land, partly included in the strip condemned, was subject to an easement entitling certain other persons to use it in common with plaintiff for the passage of cars, should have been submitted to the jury upon the question of damages; and although the requested instruction was not technically correct, yet, the court's attention having been called to it, it was error to omit all instruction on the subject. *Ibid.*

Contract for advertising: Payment in transportation.

19. A contract by which the publisher of a newspaper agreed to publish, during the year 1906, the advertising matter furnished by a railway company, "to be charged at regular rates to the amount

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of $400," "in full consideration of" which the company agreed "to issue in payment $400 worth of transportation," is construed—in view of ch. 362, Laws of 1905,—as entitling the publisher to charge the full value of advertising in excess of what was paid for in transportation, although late in the year, stating that much more advertising had been given than the contract called for, the publisher asked the company as a favor for $50 worth of additional transportation and a supplemental contract was made accordingly. *Hicks P. Co. v. Wis. Cent. R. Co.* 584

20. Whether advertising could be received in payment for transportation under ch. 362, Laws of 1905, not determined. *Ibid.*

Carriers: Injury to passenger riding in freight car.

21. In an action for injuries to a passenger riding in a freight car with his live stock it is *held* that although there was no express contract, no actual necessity, and no custom shown entitling plaintiff to ride in the car with the stock, yet the jury might well infer from the evidence that the contract was in harmony with the conduct of the parties thereunder, and might find that plaintiff was justified in supposing that he was rightly in the car and hence was not guilty of contributory negligence in being there. *Leasum v. G. B. & W. R. Co.* 593

Injury to traveler at highway crossing: Contributory negligence.

22. Where from the time when a traveler on the highway could first, by looking and listening, have known that a train was approaching a crossing in front of him (sixty-eight feet distant, in this case) his horses were so frightened by the train that they were beyond his control and he was unable to stop them or prevent their continuing in their course and colliding with the train, he was excused from performance of the usual duty to look and listen and to stop if necessary before attempting to cross the track. *Sarles v. C., M. & St. P. R. Co.* 498

23. To establish that the team was beyond the driver's control in such a case it is enough to show that he was unable, by the use of all reasonable efforts, to control and prevent them, under the impulse of their fright induced by the noise and speed of the train, from proceeding onto the track. *Ibid.*

Injury to employee: Negligence of fellow-servant: "Risk or hazard peculiar to operation of railroads."

24. While a section gang, including plaintiff, was engaged in unloading, from a handcar standing on a main track, old rails which they had removed from the roadbed some distance away and had transported on the car to the place of unloading, plaintiff was injured by a rail which was suddenly dropped or thrown to the ground by his fellow-servants. *Held*, that the injury was one arising "from a risk or hazard peculiar to the operation of railroads," within the meaning of sec. 1816, Stats. (1898), as amended by ch. 448, Laws of 1903, making a railroad company liable for such injuries even though caused by negligence of fellow-servants. *Meo v. C. & N. W. R. Co.* 340

RAPE.

See CRIMINAL LAW, 18. INDICTMENT AND INFORMATION, 3.

1. Where the defense against a charge of rape is that there was fornication only, the courts hold to a strict rule of proof as to the essentials of the greater offense. *Vogel v. State,* 315

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2. A conviction for rape may be had upon the uncorroborated testimony of the female assaulted. *Ibid.*

3. The evidence in this case is *held* to warrant the conviction of rape. *Ibid.*

4. On the trial of several persons jointly charged with rape the jury were instructed that to hold any two or more of the defendants guilty of that offense the evidence must establish that "*some one* of them" performed an act of intercourse under such circumstances that it constituted rape and that such others as are held guilty "assisted him by the exercise of force, or threats, or *otherwise*, in committing such particular act, or *procured* him to commit such act." *Held*, that the use of the word "otherwise" was not improper, since a defendant might be guilty of aiding and abetting without using force or making a threat. *Ibid.*

5. Nor did the use of the word "procured" render the instruction erroneous, it being evidently used and understood as synonymous with "aided" or "abetted," and there being no testimony to which this part of the instruction could apply if it were intended to cover absentees who counseled the commission of the offense. *Ibid.*

6. Three series of acts of intercourse at two different places during a period of two hours—there being testimony tending to show that not all of the defendants were present when any one act of intercourse took place—are *held* not to constitute a single offense but several distinct offenses. *Ibid.*

7. By the instruction above quoted (in paragraph 4) the jury were clearly told that they must acquit unless they were all agreed upon some particular act constituting the offense and also agreed as to the particular defendant who actually performed that act and as to those who assisted him therein. *Ibid.*

8. The right of the defendants in this case to have the state elect upon what particular act it relied to secure a conviction was waived by failure to request that such election be made and by a request for instruction showing that they consented to the submission of the case to the jury in the way it was submitted. *Ibid.*

9. A charge to the jury that, in order to render a person guilty as an aider and abettor, "he must himself in some way aid or assist the other in overpowering the female, or in effecting a particular act of intercourse under circumstances such as to make such act rape," was not—especially in view of the evidence in the case—misleading or prejudicial as failing to inform the jury that the person aiding or abetting must be present at the commission of the offense. *Ibid.*

10. Statements made by the prosecutrix, a short time after the commission of the offense, to those who had rescued her from defendants and were taking her to a neighboring house, in reply to their questions as to what defendants had done to her and why she did not yell, are *held* to have been admissible as part of the *res gestæ*. *Ibid.*

11. One who was present and aided and abetted another to commit rape may himself be convicted of rape although he did not have carnal knowledge of the woman. *Ibid.*

12. Same point. *State v. Brooks*, 560

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REAL PROPERTY. See APPEAL, 6. CONTRACTS, 10. DEEDS. DRAINS. EJECTMENT. EXECUTION. HIGHWAYS, 4, 7–10. MINES. MORTGAGES. NEGLIGENCE, 4, 5. PERPETUITIES. PLEADING, 2. RAILROADS, 10–18. TOWNS, 1, 2. VENDOR AND PURCHASER. WATERS. WILLS.

REASONABLE TIME. See VENDOR AND PURCHASER, 6.

RECORDING ACTS. See MORTGAGES.

REDIRECT EXAMINATION. See WITNESSES, 3.

REFERENCE. See MOTIONS.

REGISTRATION of physicians. See PHYSICIANS AND SURGEONS.

REHEARING. See APPEAL, 10.

RELEASE of surety. See PRINCIPAL AND SURETY.

REMAINDERS: Sale of. See CONTRACTS, 10. JUDGMENT, 8.

REMEDIES. Vested rights. See CONSTITUTIONAL LAW, 2–4.

RENTS AND PROFITS. See WILLS, 3.

REPUTATION. See EVIDENCE, 10. WITNESSES, 6.

RESCISSION of contract. See CONTRACTS, 9–14. DISCOVERY, 7. JUDGMENT, 8. SALES, 3–7.

RES GESTÆ. See RAPE, 10.

RES IPSA LOQUITUR. See STREET RAILWAYS, 3.

RESISTING ARREST. See CRIMINAL LAW, 5, 6.

RES JUDICATA. See JUDGMENT, 4–9.

RETURN.
Of service: Proof of falsity. See PROCESS.
To writ. See MANDAMUS, 4.

REVIVAL of action. See ABATEMENT AND REVIVAL, 2, 3.

ROADS AND STREETS. See HIGHWAYS. LIMITATIONS OF ACTIONS.

RULES OF COURT.
Supreme Court Rule 6 (Printed case) 491, 493, 654, 659.
" " " 44 (Costs for printing case) 493, 659.
Circuit Court Rule IX (Guardians *ad litem*) 194.

SALARIES of public officers: Change during term of office. See JUDGES. OFFICERS.

SALES.

Validity of contract. See CONTRACTS, 3.

When constitute interstate commerce. See CORPORATIONS, 21.

Construction of contract: Delivery: Passing of title.

1. In case of an executory contract for the sale and delivery of chattels f. o. b. cars at a particular point, if nothing appears to the contrary the intention of the parties is presumed to be that the title shall pass upon such delivery. *State ex rel. Pittsburgh C. Co. v. Patterson,* 475

2. Under a contract for the sale of coal to a railway company, providing that it should be delivered from the docks free on board cars on the vendee's tracks and be paid for according to weights there determined, and that at all times until so delivered it should be at the risk of the vendor subject to ordinary handling, it is *held* to have been the intention of the parties that the title should pass when the coal was delivered on the cars as stated; and the words "deliver" and "delivery" in certain pro-

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visions of the contract relating to the accumulation of the requisite stock of coal upon the docks before the close of navigation are *held* to have been used only in the sense of delivery for the purpose of rendering the vendor competent to make the final delivery contemplated by the contract. *Ibid.*

Sales induced by fraud, etc.: Affirmance or rescission by purchaser. See CONTRACTS, 9, 10. FRAUD.

3. Where the purchaser of corporate stock, after discovery of a fraud whereby he was induced to make the contract of purchase, elects to receive the benefits of the contract instead of to rescind it, he is liable, notwithstanding the fraud, for the agreed purchase price. *Rosenberg v. McKinney,* 381

4. Defendant's affirmance, after full knowledge of all the facts, of his contract to purchase certain corporate stock is *held* in this case to be so conclusively established by his own evidence that on reversal of a judgment entered upon a verdict in his favor the supreme court does not order a new trial, but directs judgment in favor of the plaintiff. *Ibid.*

5. Purchasers of a horse, defending on the ground of fraud an action on a note given for the price, are chargeable with knowledge, at the time of purchase, of such facts only as were obvious to them in view of their capability to observe and the opportunities accorded them. *Swanke v. Herdeman,* 654

6. Upon the evidence in such an action it is *held* that the questions whether the purchasers of a stallion represented as sound and as having been newly imported had such notice of physical defects or such opportunity for observation that they were chargeable with knowledge thereof, and whether, after discovery of the unsoundness, there had been an election to retain the stallion or such unreasonable delay in notifying the vendor of an election to rescind the sale as would estop the purchasers from their right to rescind, should have been submitted to the jury. *Ibid.*

7. Technical insufficiencies in a tender of rescission and return by purchasers may be waived by a categorical and absolute refusal of the vendor to entertain the proposal at all. *Ibid.*

Mutual mistake of fact: Sale of remainder. See CONTRACTS, 9–14. JUDGMENT, 8.

Sale prohibited by law: Cigarette paper. See CIGARETTES.

Sales on execution. See EXECUTIONS, 2, 3.

SALES OF LAND. See ACCOUNT STATED. CONTRACTS, 10. EJECTMENT, 2. EXECUTION. MORTGAGES, 2, 3. TOWNS, 1, 2. VENDOR AND PURCHASER. WATERS.

SATISFACTION of mortgage. See MORTGAGES, 2, 3.

SECRETARY OF STATE.
Restraining illegal disbursement. See COURTS.
State auditor. See STATES, 5.

SECURITY FOR COSTS. See COSTS, 2.

SERVICE of process: Return: Proof of falsity. See PROCESS.

SETOFF AND COUNTERCLAIM.

1. A court of equity will permit an equitable setoff when justice requires it, even in a case not coming within the statute of setoffs. *Piotrowski v. Czerwinski,* 396

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2. In an action upon promissory notes, of which the plaintiff was not a *bona fide* holder, it appeared that the payee, who was the real party in interest, was a nonresident, was insolvent, and was indebted to the several defendants, residents of this state, in sums exceeding the amount of the notes sued on, and that if they could not set off such debts due from him they must lose them altogether. *Held*, that the court properly allowed such debts to be set off as equitable counterclaims in the action. *Ibid.*

[3. Whether, the indebtedness of defendants on the notes being joint, and the indebtedness of the payee being to them severally, the latter would constitute legal counterclaims, is not determined.] *Ibid.*

4. Any one of the defendants in such case might set off his entire claim against that of the plaintiff in order to reduce the amount he might be called upon to pay upon an execution. *Ibid.*

5. The offsetting of such claims would bar defendants from thereafter maintaining an action against the payee of the notes in suit upon the claim so offset. *Ibid.*

SEVERAL offenses or one. See RAPE, 6.

SHERIFFS AND CONSTABLES: Return of service: Proof of falsity. See PROCESS.

SPECIAL VERDICT. See TRIAL, 6–10.

STATES.

Powers of legislature: Investigations, etc.: Incurring expenses.

1. The legislature has a broad discretionary power to investigate any subject as to which it desires information in aid of the proper performance of its legislative function or of any other act delegated to it by the fundamental law, state or national; and to that end may proceed by a duly authorized committee of one or both houses, and may incur reasonably necessary expenses, payable out of the public funds. *State ex rel. Rosenhein v. Frear*, 173

2. The workings of the primary election law for the selection of party candidates for the office of United States senator, including the conduct, legitimate or illegitimate, of persons voted for or voting at such election, as bearing on the policy of retaining or amending the law or the advisory force of its result in the given case, is a proper subject for legislative inquiry, whether the law is valid or not. *Ibid.*

3. A legislative inquiry broad enough to embrace the policy of primary election laws in general cannot be regarded as a mere attempt to administer a void law, even though the particular statute whose workings are to be investigated may be void. *Ibid.*

4. A resolution providing for a legislative investigation in aid of ordinary legislative business does not create a "debt" within the meaning of sec. 8, art. VIII, Const., relating to the passage of any law creating a state debt. *Ibid.*

5. A statute providing that the expense accounts of a legislative investigation shall be audited by the secretary of state upon the certificate of the chairman of the investigating committee stating the facts, does not confer any auditing authority upon such chairman or violate sec. 2, art. VI, Const., making the secretary of state the state auditor. *Ibid.*

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6. A legislative investigation instituted for the purpose of securing information for legislative guidance is within the domain of public purpose and general interest, as distinguished from private purpose and from a mere political party purpose and interest, even though it may have political aspects and be dominated by members of one political party. *Ibid.*

7. A legislative investigating committee charged with the duty of gathering and reporting information for legislative guidance is not a judicial tribunal within the meaning of sec. 2, art. VII, Const. *Ibid.*

Same: Regulation of railroads: Liability to employees. See RAILROADS, 1–9.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW, 1, 4–6. CORPORATIONS, 2. DRAINS, 1, 3. ELECTIONS. RAILROADS, 1–9. STATES, 5. WITNESSES, 5.

Partial invalidity: Effect. See RAILROADS, 6, 9.

Construction. See BANKS AND BANKING. CIGARETTES. CORPORATIONS, 17, 19, 21. DISCOVERY, 1, 5. DRAINS, 1–3. EJECTMENT, 2. EXECUTION, 1, 2. GUARDIANS AD LITEM, 1–6. HIGHWAYS, 5, 6, 15. JUDGES. JURY, 1. LIMITATION OF ACTIONS. MINES, 1–4. OFFICERS. PERPETUITIES. PHYSICIANS AND SURGEONS. POLICEMEN'S PENSION FUND. RAILROADS, 5, 11, 12, 20, 24. STATES, 4, 5. TRIAL, 10. WILLS, 3. WITNESSES, 1, 2.

1. In case of an ambiguous law being executed by administrative officers as having a particular meaning which is reasonable, such practical construction is entitled to more or less weight, according to circumstances, in determining the intent of the lawmakers. *State ex rel. Bashford v. Frear,* 536

2. In case of such practical construction obtaining uninterruptedly for a very long period, particularly so long as fifty years, it is entitled to controlling weight in determining the intent of the lawmakers. *Ibid.*

Amendment. See POLICEMEN'S PENSION FUND.

Statutes of other states: Presumption. See CORPORATIONS, 12. EVIDENCE, 8 9

STATUTES CITED, ETC.

(See page xxviii, following CASES CITED.)

STIPULATION as to costs, etc. See TRUSTS AND TRUSTEES, 2.

STOCK AND STOCKHOLDERS. See CORPORATIONS, 3–15.

STREET RAILWAYS.

Negligence: Injury to passengers.

1. Findings that the controller on an electric car was defective and out of repair at the time of an accident causing injury to a passenger, that the company had knowledge or ought to have known of such defective condition, and that "such negligence" was the proximate cause of the injury, do not amount to a find-

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ing of negligence, in the absence of any finding that the defect had existed for such length of time that the company might have repaired it before the accident. *Gay v. Milwaukee E. R. & L. Co.* 348

2. An affirmative answer to the disjunctive question, Did the defendant know or ought it to have known of the defective condition of the controller? is not a sufficient finding of either fact. *Ibid.*

3. An inference of negligence arising, under the doctrine of *res ipsa loquitur*, from the explosion or blowing out of the controller on an electric street car is *held* to have been met and overcome in this case by evidence showing, among other things, that such an accident might happen without any negligence on the part of the street railway company. *Ibid.*

Same: Injury to person crossing track: Contributory negligence.

4. In an action for injuries sustained in a collision between plaintiff's laundry sleigh and a street car it is *held*, upon the evidence, that it was a question for the jury whether plaintiff was negligent. *Grimm v. Milwaukee E. R. & L. Co.* 44

5. A person about to cross the track of a street railway must, as in the case of a steam railroad, look and listen for approaching cars; but there is a distinction between the two cases, in that the person wishing to cross the street railway track in advance of an approaching car has the right of way and may proceed without being guilty of contributory negligence if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car, assuming that it is moving at a reasonable and lawful rate of speed—provided, however, that if, in the exercise of ordinary care, the person about to cross can see that the car is approaching at an unlawful or unusual speed, he must take that fact into consideration in deciding whether there is time for him to safely clear the track. *Ibid.*

STREETS: Defects: Personal injuries: Notice. See LIMITATION OF ACTIONS.

SUBCONTRACTORS. See PRINCIPAL AND SURETY, 2.

SUMMONS: Service: Return: Proof of falsity. See PROCESS.

SUPPLEMENTAL COMPLAINT. See PLEADING, 1.

SUPREME COURT. See APPEAL AND ERROR. COURTS. JUDGES.

SURETYSHIP. See CORPORATIONS, 21. PRINCIPAL AND SURETY.

SURRENDER of land condemned. See RAILROADS, 10, 11.

SURVIVAL of cause of action. See ABATEMENT AND REVIVAL, 1. JUDGMENT, 6.

TAXATION of allowances. See GUARDIANS AD LITEM, 6.

TAXPAYER'S ACTION. See COURTS.

TELEGRAPHS AND TELEPHONES.

A stipulation against responsibility of a telegraph company for negligence in transmitting or delivering a message is contrary to the public policy of this state, declared both in judicial decisions and in sec. 1778, Stats. (1898); and in an action in the courts of this state based on such negligence a stipulation of

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that sort is not available as a defense, even though it was valid in the state where the contract was made and valid in the state where the message was to be delivered and where the tort in failing to deliver it promptly was committed. *Fox v. Postal T.-C. Co.* 648

TENDER of rescission. See SALES, 7.

TIMBER standing on land sold: Removal: Time. See VENDOR AND PURCHASER, 4–7.

TITLE to land. See APPEAL, 6. CONTRACTS, 10. DEEDS. EJECTMENT. EXECUTION. HIGHWAYS, 4, 7–10. PERPETUITIES. TOWNS, 1, 2. VENDOR AND PURCHASER. WATERS. WILLS, 1–5.

TOWNS.

See HIGHWAYS.

1. A petition of freeholders, emanating from an association which owned a hall and the lots upon which it stood, asking submission to the electors of the question of raising a certain sum to buy "a one-half interest in the hall," means, *prima facie*, an undivided one-half interest in the building and in the grounds on which it stands, free from incumbrances. *Rolling v. Wunderlich*, 667

2. The chairman of a town board, who was also an officer of an association owning a hall and the land on which it stood, presented to the town clerk a petition of freeholders asking submission to the electors of the question of raising money to buy a half interest in such hall. This petition was not filed nor the notices given a sufficient time before the town meeting, but the proposition was carried at such meeting. The chairman, acting both for the association and for the town, procured a town order for the amount to be paid, receipted for it as an officer of the association, and delivered it to the association without requiring any conveyance from the association to the town, and thereafter, as a creditor of the association, had the order transferred to him and obtained the money thereon. *Held*, that his dereliction in duty as a town officer in failing to obtain the conveyance, combined with the defects in the proceedings, rendered him liable to the town for the return of the money, with interest. *Ibid.*

3. A resolution adopted at town meeting instructing the town officers to start an action against two persons named unless satisfaction as to a certain matter was obtained, was sufficient to authorize an action against one or both of such persons. *Ibid.*

TRANSACTIONS with persons since deceased. See CONSTITUTIONAL LAW, 4. WITNESSES, 1, 2.

TRIAL.

In criminal actions. See CRIMINAL LAW AND PRACTICE.

Determination of questions of fact arising on motions. See MOTIONS.

Procuring jurors: Special venire. See JURY.

Reception of evidence: Striking out answers.

1. It is not error to strike out the answer of a witness which is not responsive to the question. *Chase v. Woodruff*, 641

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Questions for jury. See APPEAL, 9. ELECTRICITY, 4. NEGLIGENCE, 2, 5. RAILROADS, 5, 6. STREET RAILWAYS, 4.

Instructions to jury. See APPEAL, 6. CRIMINAL LAW, 11–19. EMBEZZLEMENT, 4, 5. HIGHWAYS, 7–10, 14, 15. INSTRUCTIONS TO JURY. NEGLIGENCE, 1. RAILROADS, 18. RAPE, 4, 5, 7, 9.

2. It is not error to refuse to give requested instructions relating to matters sufficiently covered by the general charge. *Milbrath v. State,* 354

3. Same point. *Ryan v. Oshkosh G. L. Co.* 466

4. An instruction, relative to admissions testified to as having been made by certain of plaintiff's witnesses at the time of the accident, to the effect that such admissions are considered in law as the weakest kind of evidence, is *held,* even if not giving fully the law on the subject, not to have been prejudicial to defendant. If more specific instructions were desired by defendant they should have been requested. *Maxwell v. Wellington,* 607

5. Language of the trial court, after giving instructions requested by the parties, "Now, I will come back to my own instructions," is disapproved but *held* not prejudicial error. *Ibid.*

Special verdict. See ELECTRICITY, 1–3. FRAUD, 7. HIGHWAYS, 13. NEGLIGENCE, 5. RAILROADS, 15. STREET RAILWAYS, 1, 2.

6. Questions for a special verdict need not cover mere evidentiary matters, nor is there ordinarily any necessity for reciting evidentiary facts therein. *Palmer v. Schultz,* 455

7. Plaintiff's intestate having been killed by falling through an open space in a viaduct, a question for special verdict, "Was the condition of such open space obvious to a traveler on foot crossing the viaduct from the east side toward such opening, exercising ordinary care?" is *held* to have fairly submitted the phase of contributory negligence sought to be covered by a question proposed by defendant, "Under the conditions as to lights, barriers, guard rails, etc., surrounding or adjacent to the open space, . . . was such opening obvious," etc.? *Ibid.*

8 So, also, the question "Was such open space properly guarded at the time of the injury?" accompanied by a charge fully defining defendant's duty to maintain suitable guards, fairly submitted the issue, and it was not error not to submit a proposed question, "Did the defendant fail to exercise ordinary care in leaving the opening . . . in the condition as to lights, barriers, guard rails, etc., in which it was left," etc.? *Ibid.*

9. So, also, intoxication of the deceased on the night in question was a mere evidentiary fact tending to establish contributory negligence, and was properly submitted to the jury by a general question on the subject of such negligence, accompanied by proper instruction. *Ibid.*

10. Under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), omission to submit any controverted question in the special verdict is not ground for reversal if there was no specific request for such submission. A finding thereon in conformity with the judgment will be presumed to have been made by the court, and if the evidence is sufficient to sustain such finding it will not be disturbed. *Bratz v. Stark,* 599

Findings of fact by court. See APPEAL, 3. JUDGMENT, 7–9. MOTIONS. TRIAL, 10.

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TROVER AND CONVERSION.

See CORPORATIONS, 9, 10. EMBEZZLEMENT.

A verdict to the effect that plaintiff had wrongfully converted to his own use corporate stock delivered to him by defendant is *held* to be sustained, although there was conflict and confusion in the evidence as to the agreement under which it was delivered and as to plaintiff's refusal to return it. *Rosenberg v. McKinney*, 381

TRUSTS AND TRUSTEES.

See DISCOVERY, 8. EMBEZZLEMENT, 4. GUARDIANS AT LITEM. PERPETUITIES. WILLS, 3.

1. Generally speaking, it is improper for a court to adjudge or order paid out of trust funds the expenses of litigation of a defeated party respecting such fund except to the extent of his interest in the fund. *Will of McNaughton*, 179
2. In general, representatives of owners of a trust fund have no authority to stipulate away the subject of the trust in payment of costs and expenses of litigation respecting the fund, and any such stipulation should not be recognized by the court as a basis for an order or judgment. *Ibid.*
3. Without plain legislative authority a trust fund should not, in any case, be depleted to pay the expenses of litigation in respect thereto of a person who has no interest therein. *Ibid.*
4. The legislature may make reasonable regulations for compensating out of a trust fund a representative, such as a guardian *ad litem* of an infant, required to be made a party to litigation, for his services and necessary expenditures, regardless of whether the infant has any interest in such fund. *Ibid.*
5. Compensation for services of a judicial assistant, such as a guardian *ad litem*, in the conservation of a trust fund, should be limited to the reasonable value of somewhat similar services in official life. *Ibid.*

UNDUE INFLUENCE. See INSURANCE, 4.

USER. See HIGHWAYS, 4, 7, 9, 10.

VALUE. See EVIDENCE, 11. RAILROADS, 14–18.

VARIANCE. See CONTRACTS, 11, 13. INDICTMENT AND INFORMATION.

VENDOR AND PURCHASER OF LAND.

See CONTRACTS, 10. EJECTMENT, 2. MORTGAGES, 2, 3. TOWNS, 1, 2. WATERS.

1. A land contract and a deed made in execution thereof, in both of which the words "excepted" and "reserved" were used interchangeably with respect to timber on the land, are construed as showing an intention of the parties that such timber should be excepted from the conveyance, and it is *held*, therefore, that the title thereto remained in the grantor. *Western L. & C. Co. v. Copper River L. Co.* 404
2. Under a land contract and a subsequent deed in pursuance thereof the real transfer of title takes place at the time of the contract, at least in case of part payment of the consideration, and the deed when made relates back to the date of the contract. *Ibid.*

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3. Where in such case the deed is made by a transferee of the rights of the original vendor subject to the land contract and, as to the right to cut and remove timber excepted from the grant, expressly refers to the terms and conditions of the contract, such terms and conditions control that right. *Ibid.*

4. Where otherwise the result would be unreasonable or absurd, a mere agreement in a land contract to remove within a certain time standing timber which is to be excepted from the conveyance may be construed to include a further agreement that failure to so remove the timber shall be deemed a breach of a condition subsequent and divest the vendor of his title thereto. *Ibid.*

5. So *held* as to a contract for the sale of a large tract of land for the known purpose of colonization and sale in small parcels to settlers, where no right of actual occupancy and use could be transferred to such settlers so long as timber belonging to the original vendor remained on the parcels purchased by them. *Ibid.*

6. In a contract for the sale of 37,000 acres of land excepting the standing timber, an agreement by the vendor to remove all of such timber at a definite rate was followed by a provision recognizing failure to do so as within contemplation. Upon the evidence as to the situation of the parties, it is *held* that, while removal of the timber was a condition subsequent, yet it was the evident intention of the parties that there should be some period of grace during which the failure of strict performance should not work a forfeiture of the vendor's title to the timber; and such period not being specified, the vendor was entitled to a reasonable time, in view of all the circumstances, for removal of the timber after the expiration of the time expressly stipulated. *Ibid.*

7. In a contract for sale of a large tract of land to a company for colonization purposes the timber was excepted and the vendor agreed to pay the taxes until all the timber had been removed or until a tract or tracts should be sold or contracted by the purchaser to third persons. *Held*, that assignment of the contract by the purchaser to another company was not such a sale of a tract or tracts as relieved the vendor from payment of taxes. *Ibid.*

VENIRE. See JURY.

VERDICT. See TRIAL, 6–10.

VESTED RIGHTS. See CONSTITUTIONAL LAW, 2–4.

VETERANS' HOME: Discharge of inmate. See CORPORATIONS, 17, 18.

VOTING corporate stock: Right of pledgor. See CORPORATIONS, 3, 4.

WAIVER.
Of strict performance. See CONTRACTS, 8. INSURANCE, 5.
Of right to relief against mistake. See CONTRACTS, 10, 13, 14.
Of security, etc. See PRINCIPAL AND SURETY.
Of right to have prosecution elect as to particular act relied on. See RAPE, 8.
Of right to rescind. See SALES, 4, 6.
Of defects in tender of rescission. See SALES, 7.
Of right to more specific instructions. See TRIAL, 4.

WARRANT OF ATTORNEY. See JUDGMENT, 2, 3.

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WATERS.

1. A lock is *held* to have constituted a part of a canal and to have been included in a conveyance thereof, though not specifically mentioned. *Winnebago Paper Mills v. Kimberly-Clark Co.* 425

2. The rights of the parties under such conveyance are to be determined as of the date thereof, and the subsequent filling up of the canal or lock could not operate to divest the title acquired. *Ibid.*

3. A conveyance of a dam and mill races or canals and the water power furnished by the dam, reciting that it was intended thereby to convey the entire interest of the grantor in all said property, carried the grantor's title to the fee of the bed and banks of the canals, including a lock, and not a mere easement to use the same for water-power purposes; and upon discontinuance of the use of the lock it did not revert to the grantor. *Ibid.*

WILLS.

What constitutes a will: Deed conveying land: Delivery.

1. An instrument in the form of a deed, plain and unambiguous on its face, conveying a present interest in land and unexplained by any contemporaneous writing of a testamentary character, cannot be held to be a will. *Dexter v. Witte,* - 74

2. Thus, an instrument in the form of a deed, conveying land in trust, with power to sell, lease, or mortgage the same, and directing distribution of the proceeds among certain descendants of the grantor, which had been intrusted by the grantor, during her last illness, to a third person, to be kept by him with other papers for her, but with instructions to deliver it to the grantee in case she did not recover from such illness, and which had, after her death, been handed by said third person to the grantee, is *held* not to have been delivered so as to be valid as a deed, and not to be a will. *Ibid.*

Construction.

3. A testatrix devised the future rents and profits of lands to her father during his life; at his death to her brother and three sisters and survivor of them for life; and after the death of the last survivor the lands to be sold and the proceeds divided among the children of the persons last named and her half brothers and sisters, children of her father, who should be surviving at that time. There was no devise in trust and nothing in the will to bring it within the provisions of sec. 2081, Stats. (1898). *Held:*

(1) The will did not create any trust.

(2) The disposition so made of the rents and profits is, under sec. 2060, Stats. (1898), to be governed by the rules in relation to future estates in land.

(3) The future estate attempted to be given to the brother and sisters is void under secs. 2038, 2039, Stats. (1898), since under the terms of the will the property could not be sold during the continuance of five lives in being at the creation of the estate.

(4) The estate attempted to be devised to the nephews, nieces, etc., of the testatrix is a contingent future estate, since the persons to whom it is limited must remain uncertain until the

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ceasing of the precedent estate. Such estate would also offend against secs. 2038, 2039.
(5) No part of the devise can be upheld. *Will of Adelman*, 120

4. A will gave to the testator's widow and his two sons, each a one-third interest in the residue of the estate. A codicil provided that one son "buy out and pay off the others to the extent of their shares so that" he "will be the owner of the home farm which I [testator] value at about $6,000." *Held*, that the codicil did not cut down the gift first made, but was precatory only. *Moore v. Moore*, 602

5. A provision of a will is not to be so construed as to cut down a gift made in positive and clear terms in a prior provision unless it does so by the use of words definite in meaning and in positive terms expressive of such an intent. *Ibid.*

Costs on contest between legatees. See COSTS, 1.

WISCONSIN STATE BOARD OF MEDICAL EXAMINERS. See PHYSICIANS AND SURGEONS.

WISCONSIN VETERANS' HOME: Discharge of inmate. See CORPORATIONS, 17, 18.

WITNESSES.

Competency. See CONSTITUTIONAL LAW, 4.

1. Ch. 197, Laws of 1907, respecting the competency of officers of a corporation to testify, deals with the status when the person is offered as a witness. *Will of McNaughton*, 179

2. A defendant in ejectment was incompetent, under sec. 4069, Stats. (1898), to testify that at a certain time he saw the deed under which the plaintiff claims in the possession of the grantor, where he obtained such information in a transaction with said grantor, since deceased, in which the deed was shown to him by the grantor for the purpose of examination. *Woodruff v. Chase*, 641

Qualification to give opinions. See EVIDENCE, 13.

Examination. See TRIAL, 1.

3. Upon redirect examination of a witness anything fairly explanatory of that which was drawn out on cross-examination is proper. *Jacobsen v. Whitely*, 434

4. Independent of statute a party has the right to examine a hostile or adverse witness, and it is largely in the discretion of the trial court whether questions in the nature of cross-examination shall be allowed. *Ryan v. Oshkosh G. L. Co.* 466

[5. Whether sec. 4068, Stats. (Laws of 1907, ch. 271),—providing that any agent or employee of a corporation which is a party may be examined upon the trial as if under cross-examination, at the instance of the adverse party,—is valid, not determined.] *Ibid.*

Impeachment. See CRIMINAL LAW, 3.

6. Evidence to impeach defendant as a witness was properly admitted where a foundation for it was laid by showing that the witnesses based their conclusions upon their knowledge of his general reputation among those with whom he resided, and the inquiry was restricted to whether, in view of defendant's gen-

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eral reputation for truth and veracity, the witnesses would believe him under oath. *Duffy v. Radke*, 38

7. A witness for the state had written an account of the crime for a newspaper, but testified that it was not published as he wrote it. This testimony was not contradicted. Defendants offered in evidence the published article (which was claimed to give a very distorted account of the affair) for the purpose of showing bias on the part of the witness and of otherwise impeaching his testimony. *Held* that, in view of the uncontradicted testimony that the article was not published as written, it was properly excluded. *Vogel v. State*, 315

WORDS AND PHRASES.

Agent, in contract. See CORPORATIONS, 21.
Contracted, in land contract. See VENDOR AND PURCHASER, 7.
Crevice, in statute. See MINES, 1, 4.
Debt, in constitution. See STATES, 4.
Deliver, delivery, in contract. See SALES, 2.
Deposit of money, in statute. See BANKS AND BANKING, 1, 4, 5.
Discovery, in statute. See MINES, 3, 4.
Encroachment, in statute. See HIGHWAYS, 5.
Error, in statute. See PHYSICIANS AND SURGEONS, 1.
Excepted, in deed. See VENDOR AND PURCHASER, 1.
Fellow-servant. See MASTER AND SERVANT, 10.
His term of office, in constitution. See JUDGES, 2, 3.
Injured, injury, in statute. See POLICEMEN'S PENSION FUND.
Insolvent, in statute. See BANKS AND BANKING, 8–11.
Interest in a hall, in petition. See TOWNS, 1.
Judicial, in constitution. See STATES, 7.
Lock, in deed. See WATERS, 1.
Money, in statute. See BANKS AND BANKING, 1.
Obstruction, in statute. See HIGHWAYS, 5, 6.
Ordinary care. See NEGLIGENCE, 1.
Person, in constitution. See CORPORATIONS, 2.
Physician, in statute. See PHYSICIANS AND SURGEONS, 2.
Procured, in charge to jury. See RAPE, 5.
Range, in statute. See MINES, 1, 4.
Reputable, in statute. See PHYSICIANS AND SURGEONS, 3.
Reserved, in deed. See VENDOR AND PURCHASER, 1.
Risk or hazard peculiar to the operation of railroads, in statute. See RAILROADS, 24.
Sold or contracted, in land contract. See VENDOR AND PURCHASER, 7.
Term of office, in constitution. See OFFICERS.
Unsafe or insolvent, in statute. See BANKS AND BANKING, 8–11.

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